# SUPREME COURT OF THE UNITED STATES,

## OCTOBER TERM, 1909.

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## No. 474.

### JAMES H. HOLT, PLAINTIFF IN ERROR,

vs.

### THE UNITED STATES.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

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1 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

JAMES H. HOLT, DEFENDANT AND PLAINTIFF IN ERROR,
*vs.*
UNITED STATES OF AMERICA, PLAINTIFF AND DEFENDANT in error. | No. 1682.

TRANSCRIPT OF RECORD.

To the Supreme Court of the United States, Washington, D. C., from the Circuit Court of the United States for the Western District of Washington, Northern Division.

2,3 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

JAMES H. HOLT, DEFENDANT AND PLAINTIFF IN ERROR,
*vs.*
UNITED STATES OF AMERICA, PLAINTIFF AND DEFENDANT in error. | No. 1682.

COUNSEL.

Hugh M. Caldwell, esq., 534 Pioneer Building, Seattle, Wash.; Charles F. Riddell, esq., 534 Pioneer Building, Seattle, Wash., attorneys for defendant and plaintiff in error.

Honorable Elmer E. Todd, United States district attorney, Federal Building, Seattle, Wash.; Charles T. Hutson, esq., assistant United States attorney, Federal Building, Seattle, Wash.

4 In the United States Circuit Court for the Western District of Washington, Northern Division.

May term, A. D. 1908.

THE UNITED STATES OF AMERICA,
*Western District of Washington, ss:*

UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. | No. 1682.

*Indictment. Sec. 5339 R. S.*

FIRST COUNT.

The grand jurors of the United States of America, duly empaneled, sworn, and charged to inquire within and for the said Western District of Washington, Northern Division, upon their oaths present:

That one James H. Holt, on the 8th day of May, A. D. 1908, within the Fort Worden Military Reservation, a place under the exclusive

jurisdiction of the United States of America, and within the Western District of Washington, Northern Division, did, with force and arms, an assault make upon one Henry E. Johnson with a certain iron bar, known as a fish plate, which the said James H. Holt then and there held in his hands, and did then and there feloneously, wilfully, knowingly, and with malice aforethought strike, beat, and mortally wound him, the said Henry E. Johnson, with said iron bar, known as a fish plate, upon the head of him, the said Henry E. Johnson, with intent to kill and murder him, the said Henry E. Johnson, thereby giving to him, the said Henry E. Johnson, upon his head mortal wounds, the number of which is to the grand jurors unknown, from which said mortal wounds the said Henry E. Johnson then and there languished and died within said Fort Worden Military Reservation in said Western District of Washington, on said 8th day of May, 1908. And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said James H. Holt, in the manner and at the time aforesaid, did feloneously, wilfully, and with malice aforethought kill and murder the said Henry E. Johnson; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

ELMER E. TODD,
*United States Attorney.*

Witnesses examined before grand jury: R. P. Reeder, Robert V. Church, Edward Shafer, Benjamin F. Guinan, Charles J. Coleman, George E. Handley, H. W. Newton, Dr. E. H. Porter.

Presented to the court by the foreman of the grand jury in open court, in the presence of the grand jury, and filed in the U. S. Circuit Court May 22, 1908. A. Reeves Ayres, clerk. By A. N. Moore, deputy.

(Endorsed:) Indictment for violation sec. 5339 R. S. A true bill. Ben W. Barnes, foreman grand jury. Filed May 22, 1908. A. Reeves Ayres, clerk. By R. M. Hopkins, deputy. Elmer E. Todd, U. S. attorney.

In the United States Circuit Court for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT.
No. 1682.

*Demurrer.*

Comes now the defendant, James H. Holt, by his attorneys, Hugh M. Caldwell and C. F. Riddell, into court, and having heard the indictment read, demurs thereto for the following reasons, to wit:

First. That the matters and things in said indictment alleged and set forth are not sufficient in law to compel him, the said James H. Holt, to answer thereto.

Second. That the matters and things therein alleged and set forth are not sufficient to charge this defendant with the violation of any law of the United States or the commission of any crime against the United States, or with the violation of any law or the commission of any crime whatsoever.

Third. That the matters and things therein alleged and set forth do not show that this court has jurisdiction of this defendant or of the crime alleged to have been committed.

All of which this defendant is ready to verify.

Wherefore he prays judgment and that he may be discharged.

CALDWELL & RIDDELL,
*Attorneys for James H. Holt.*

UNITED STATES OF AMERICA,
*Western District of Washington, Northern Division, ss:*

7 C. F. Riddell, being first duly sworn, on oath says: That he is one of the attorneys for the defendant in the above entitled action; that he has heard the foregoing demurrer read, knows the contents thereof, and believes the same to be meritorious and well founded in law.

C. F. RIDDELL.

Subscribed and sworn to before me this 13th day of June, A. D. 1908.

[SEAL.] H. M. CALDWELL,
*Notary Public in and for the State of Washington, residing at Seattle.*

Service of the within demurrer by delivery of a copy to the undersigned is hereby acknowledged this 15th day of June, 1908.

ELMER E. TODD,
*Attorney for Plaintiff.*

(Indorsed:) Demurrer to indictment. Filed in the U. S. Circuit Court, Western Dist. of Washington, June 15, 1908. A. Reeves Ayres, clerk; R. M. Hopkins, dep.

8 In the Circuit Court of the United States, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA
*vs.*
J. H. HOLT. } No. 1682.

*Demurrer overruled.*

Now on this 15th day of June, 1908, this cause comes on to be heard upon the demurrer of the defendant to the bill of indictment returned in this cause; the United States being represented by Elmer E. Todd, esquire, United States attorney, and the defendant being

present and represented by his counsel, Caldwell & Riddle; after hearing argument of respective counsel and being sufficiently advised in the premises, it is by the court ordered that the said demurrer be, and the same is hereby, overruled; to which ruling of the court the defendant excepts, and his exception is allowed.

Entered in Journal, Circuit Court, vol. 1, page 207.

9 In the United States Circuit court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA
*vs.*
JAMES H. HOLT. } No. 1682.

*Plea.*

Now on this 15th day of June, 1908, into open court comes the defendant, J. H. Holt, accompanied by his counsel, Caldwell & Riddle, and here and now enters his plea of not guilty to the charge in the indictment herein against him.

Entered in Journal, Circuit Court, vol. 1, page 207.

10 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA
*vs.*
JAMES H. HOLT. } No. 1682.

*Verdict.*

We, the jury in the above-entitled cause, find the defendant guilty as charged in the indictment, without capital punishment.

W. H. PUMPHREY, *Foreman.*

(Endorsed:) Verdict. Filed in the U. S. Circuit Court, Western District of Washington, Dec. 22, 1908. A. Reeves Ayres, clerk; A. N. Moore, deputy.

11 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. } No. 1682.

*Motion in arrest of judgment.*

And now comes the defendant and moves the court to arrest judgment on the indictment herein upon which the defendant was convicted, because:

1. The facts stated in the indictment herein do not constitute an offense against the laws and statutes of the United States.
2. The court erred in overruling the demurrer of defendant to said indictment.
3. The indictment herein was found on incompetent evidence, as appears from defendant's motion to quash the indictment and plea in abatement filed herein.
4. The court erred in overruling defendant's said motion to quash the indictment herein and plea in abatement.

CALDWELL & RIDDLE,
*Attorneys for Defendant.*

Due service of a copy of the within motion in arrest of judgment acknowledged this 8th day of January, 1909.

ELMER E. TODD,
*U. S. District Attorney.*

(Endorsed:) Motion in arrest of judgment. Filed U. S. Circuit Court, Western District of Washington, Jan. 8, 1909. A. Reeves Ayres, clerk; A. N. Moore, deputy.

12 In the United States Circuit Court for the Western District of Washington, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. } No. 1682.

*Order denying motion in arrest of judgment.*

This cause came on to be heard upon defendant's motion in arrest of judgment, the United States appearing by Elmer E. Todd, esq., United States attorney for the western district of Washington, and the defendant appearing in person and by his attorneys, Messrs. Caldwell & Riddell, and the court having heard the argument of counsel, and being fully advised in the premises, denies said motion.

Wherefore it is ordered, that the said motion be, and the same is hereby, denied, to which order and all thereof defendant prays an exception, which is hereby allowed.

Done in open court this 8th day of March, 1909.

C. H. HANFORD, *Judge.*

(Endorsed:) Order denying motion in arrest of judgment. Filed U. S. Circuit Court, Western District of Washington, March 8, 1909. A. Reeves Ayres, clerk; W. D. Covington, deputy.

13 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. } No. 1682.

*Motion.*

Comes now the defendant herein by his attorneys, Caldwell & Riddell, and in support of his motion for a new trial, filed herewith, moves this honorable court as follows:

I.

That jurors James Doran, William Henry Pumphrey, and George W. Douglas, now in attendance upon this court, and who sat as jurors in the trial of the above entitled case, be called before this court and be required to answer under oath concerning the allegations set forth in the affidavit of Hugh M. Caldwell, dated January 7, 1909, and filed herewith, that it may be determined by this court whether the statements related by said jurors to the affiant therein are in fact true, and whether said facts constitute grounds for a new trial.

CALDWELL & RIDDELL,
*Attorneys for defendant.*

Due service of a copy of the within motion for examination of jurors acknowledged this 8th day of January, 1909.

ELMER E. TODD,
*U. S. Dist. Atty.*

(Endorsed:) Motion for examination of jurors. Filed U. S. Circuit Court, Western District of Washington, Jan. 8, 1909. A. Reeves Ayres, clerk; A. N. Moore, deputy.

14 In the United States Circuit Court for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. } No. 1682.

*Order denying motion for examination of jurors.*

This cause came on to be heard upon the motion of the defendant to call before the court and to examine certain jurors who sat as trial jurors in said cause, the United States appearing by Elmer E. Todd, esq., United States attorney for the Western District of Washington, and the defendant appearing in person and by his attorneys,

Messrs. Caldwell & Riddell, the court having heard the argument of counsel, and being fully advised in the premises, denies said motion.

Wherefore it is ordered, that said motion be, and the same is hereby, denied, to which order and all thereof the defendant prays an exception, which is hereby allowed.

Done in open court this 8th day of March, 1909.

C. H. HANFORD, *Judge.*

(Endorsed:) Order denying motion for examination of jurors. Filed U. S. Circuit Court, Western District of Washington, Mar. 8, 1909. A. Reeves Ayres, clerk; W. D. Covington, deputy.

15 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. } No. 1682.

*Motion for new trial.*

The defendant moves that the verdict herein rendered be vacated and a new trial awarded for the following reasons:

First. Irregularities in the proceedings of the court, jury, and United States attorney, various orders of the court, and abuses of discretion by the court, by each of which the defendant was prevented from having a fair trial.

Second. Misconduct of the jury.

Third. Insufficiency of the evidence to sustain the verdict, in the following particulars: As to the jurisdiction of the United States over Fort Worden Military Reservation. Captain M. C. Buckey could not identify the boundaries of said Fort Worden as coincident with the boundaries of the places described in the various deeds and decrees attempted to be offered in evidence, nor with the boundaries of any other place. The book marked "Plaintiff's Exhibit B" was not offered in evidence for the consideration of the jury, nor was it so received in evidence.

Fourth. Misconduct of the United States attorney, as follows:

(*a*) In saying to the jury in his opening statement that defendant has confessed the crime for which he was then on trial.

16 (*b*) In repeating that statement in the presence of the jury in his argument over the admissibility of the statements alleged to have been made by defendant to Captain Harry W. Newton.

(*c*) In arguing with the court that said alleged statements were voluntary and admissible after the court had held them inadmissible, all in the presence of the jury.

Fifth. Errors in law occurring at the trial, as follows:

(*a*) Permitting the prosecutor to ask the jurors on their voir dire whether they had any scruples against capital punishment.

(*b*) Allowance of challenges to jurors for cause on the ground that they had conscientious scruples against capital punishment.

(*c*) Refusal of challenges for cause by defendant to jurors who had formed an opinion as to defendant's guilt or innocence which it would require evidence to remove.

(*d*) Admission of testimony of Captain M. C. Buckey to show jurisdiction of the United States over said Fort Worden.

(*e*) Admission of testimony of Captain M. C. Buckey, reading from the book marked "Plaintiff's Exhibit B."

(*f*) Receiving in evidence for the consideration of the court, the book marked "Plaintiff's Exhibit B."

(*g*) Permitting book marked "Plaintiff's Exhibit B" to go to the jury room and remain in the custody of the jury while they were deliberating on their verdict.

(*h*) Admission of testimony of witnesses Reeder, Porter, and Newton that defendant, by order of his superior officers in the United States Army, put on the blouse marked "Plaintiff's Exhibit S," and that said blouse fit the defendant.

(*i*) Refusal of the court to consolidate the indictments in this case and in case #1683 in this court, United States vs. James H. Holt and Thomas H. Knight, both of which were for the same alleged
17 offense, or to admit in evidence a certified copy of said indictment in cause #1683.

(*j*) Refusal of the court to permit cross-examination of witness Edward Shafer alias George E. Noll, to show that no unfair advantage was taken of him in taking his statement, before the trial, about his knowledge of the facts at issue in this case.

(*k*) Refusal of the court to permit cross-examination of said witness Shafer alias Noll, as to statements made by him on his enlistment, August 25, 1905.

(*l*) Refusal of the court to give in full the instruction requested by defendant entitled "Instruction on evidence that the crime was committed by another person than the accused."

(*m*) Refusal of the court to give the instruction on the presumption of innocence as requested by defendant.

(*n*) Refusal of the court to instruct the jury that the presumption of innocence is evidence in the defendant's favor, as requested by defendant.

(*o*) Refusal of the court to give the instruction on reasonable doubt, as requested by the defendant.

(*p*) The instruction by the court that: "We begin with a legal presumption that the defendant, although accused, is an innocent man. Not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted."

(*q*) The instruction by the court on the question of reasonable doubt, and the language that the jury must not understand "that the phrase, or the principle (reasonable doubt) means that the Government is placed in the situation of having to do an impossible

thing, of establishing the guilt of accused person to an absolute moral certainty."

18 (*r*) The instruction of the court on reasonable doubt given to the jury upon their return to the court room and request for instruction on what constitutes a reasonable doubt.

(*s*) Refusal of the court to add in his instruction on reasonable doubt, upon the occasion of the return of the jury and their request for instruction on that point, that if the jury found one fact inconsistent with defendant's guilt, that would be sufficient to raise a reasonable doubt, as requested by defendant.

This application for a new trial is based on the affidavit of Hugh M. Caldwell and on the motion filed herewith, on the record, pleadings, motions and orders filed herein, and on the minutes of the court.

CALDWELL & RIDDELL,
*Attorneys for the Defendant.*

Due service of a copy hereof acknowledged this 8th day of January, 1909.

ELMER E. TODD,
*U. S. District Attorney.*

(Endorsed:) Motion for new trial. Filed U. S. Circuit Court, Western District of Washington, Jan. 8, 1909. A. Reeves Ayres, clerk. A. N. Moore, deputy.

19 In the United States Circuit Court for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. } No. 1682.

*Order denying motion for new trial.*

This cause came on to be heard upon defendant's motion for a new trial, the United States appearing by Elmer E. Todd, esq., United States attorney for the Western District of Washington, and the defendant appearing in person and by his attorneys, Messrs. Caldwell & Riddell, and the court having heard the argument of counsel, and being fully advised in the premises, denies said motion.

Wherefore it is ordered that said motion be and the same is hereby denied, to which order and all thereof defendant prays an exception, which is hereby allowed.

Done in open court this 8th day of March, 1909.

C. H. HANFORD, *Judge.*

(Endorsed:) Order denying motion for new trial. Filed in U. S. Circuit Court, Western District of Washington, Mar. 8, 1909. A. Reeves Ayres, clerk. W. D. Covington, deputy.

20 United States Circuit Court, Western District of Washington, Northern Division.

UNITED STATES OF AMERICA,
*vs.*
JAMES H. HOLT.
No. 1682. Filed March 4, 1909.

Criminal law. Case heard on motions after a verdict finding the defendant guilty of murder. Motions denied.

Elmer E. Todd, United States district attorney.

Caldwell & Riddell, for defendant.

HANFORD, District Judge:

The defendant having been indicted for the crime of murder committed at the Fort Worden military post, after a motion to quash the indictment had been denied and a demurrer had been overruled, entered a plea of "Not guilty," and after a trial the jury returned a verdict finding him guilty as charged "without capitol punishment." His counsel have interposed in his behalf three motions, viz:

A motion to summon the jurors for examination in open court for the purpose of eliciting facts impeaching the verdict;

A motion in arrest of judgment;

A motion for a new trial.

The first of the three motions is upon the ground that the trial was prolonged through a number of days and at each adjournment and recess of the court previous to the final submission of the case to the jury the jurors were permitted to separate and they were free to read, and did read, the daily newspapers, in which the case was referred to and commented upon in a manner prejudicial
21 to the defendant's case. An affidavit in support of the motion alleges that several days after the verdict had been returned one of the jurors admitted having had a conversation at his home with a hired man, in which the trial was mentioned. The juror referred to has made a counter affidavit, explaining that the conversation with his hired man was had after the verdict had been returned, and alleging that during the time the case was on trial he did not have any conversation with any person whomsoever in which the case was mentioned. It is the opinion of the court that the defendant has had a fair trial by a jury composed of fair-minded, intelligent, honest men, and it will not be presumed that they were influenced in making their decision by the newspapers. Previous to the arguments made to the jury the court cited one of the reporters and in the presence of the jury interrogated him concerning a published article referring to the case, which the jurors necessarily knew was inaccurate, and elicited from him an admission that he was the author of it, and that he had been misinformed in regard to some of the facts, and thereupon the court admonished and advised the jurors to be careful to not give heed to unreliable statements published by the papers, and on each occasion of adjournment the court admonished the jurors to refrain from talking about the case or any

subject connected with it, either with each other or with any person, and to not listen to anything which might be said about the case out of court, and to not have any communication on any subject whatever with the parties, witnesses, or attorneys in the case, and to avoid, as far as possible, receiving any impression as to the merits of the case other than what should be made upon their minds by the proceedings on the trial. There is no reasonable ground for supposing that either of the jurors failed to faithfully observe these instructions. I do not entertain even a suspicion of wrongdoing on the part of either of the jurors, therefore I am unwilling to insult them by instituting the inquisition proposed. It is not good practice to admit the testimony of jurors to impeach a verdict rendered
22 conformably to law, and it would not tend to promote the ends of justice to permit a defendant who has been convicted of a heinous crime to turn the tables by putting his triers on trial on a mere hope of success in an undertaking to extort from them admissions to prove that the verdict may have been based upon prejudice and not upon the fact of his guilt proved by the testimony of witnesses.

The motion in arrest of judgment challenges the jurisdiction of the court, the sufficiency of the indictment, and the competency of the evidence upon which it was founded. The specific ground for disputing the jurisdiction of the court will be considered in disposing of the third motion. No flaw in the indictment has been pointed out nor discovered by the court. As to the remaining ground, it would be sufficient to say that the court does not know what evidence was submitted to the grand jury, but I will make an additional explanation. By the motion to quash the indictment an attempt was made to show that incompetent evidence, in the nature of a confession by the defendant, was received and considered by the grand jury, and the present motion is a renewal of that attempt. Such evidence was offered on the trial, and it was excluded by the court, nevertheless the evidence admitted by the court convinced the trial jury of the defendant's guilt, and it is the opinion of the court that it was amply sufficient to justify the verdict. As the names of the witnesses who testified on the trial are endorsed upon the indictment, there is a necessary presumption that the grand jury was informed by legal evidence of the important facts, and that if no evidence except that which the court deems competent had been submitted a true bill would have been founded upon it. It is not the province of the grand jury to pass upon the ultimate question of the guilt or innocence of an accused person. While that body is engaged in the investigation of his case he is not permitted to be present nor can his counsel participate in sifting the evidence then. There is no way provided for a review of the evidence elicited upon the preliminary
23 and secret investigation of a case by a grand jury in its entirety, nor will a court permit itself to become involved in endless entanglements by considering affidavits presenting mere fragments of it. Hence all questions as to the relevancy, competency, and sufficiency of

the evidence must be determined upon the trial of the case after a plea of "Not guilty." It is only in rare instances when a court is convinced by a showing of facts that the grand jury has been used as an instrument of persecution or that fundamental principles of jurisprudence have been disregarded in the proceedings of the grand jury, e. g., by compelling an accused person to appear and give incriminating testimony against himself, or where the grand jury was not composed of qualified persons, that a court will set aside an indictment for reasons not apparent on the face of the record. Wharton's Crim. Pl. & Pr. (9th ed.) secs. 363–388; 10 Enc. of Pl. & Pr., p. 569; U. S. vs. Terry, 39 Fed. Rep., 355.

An instructive opinion on this branch of the law was rendered by Judge Whitson in the case of the United States v. Wells, 163 Fed. Rep., 313. The indictment charged a number of persons with criminal conspiracy, some of whom had been compelled to testify before the grand jury and were subjected to browbeating cross-examinations. There was a quest for big game and a United States Senator was included among those indicted. He had been acquitted by a jury on a trial before Judge Whitson, and referring to him in the opinion the judge said: "The court has occasion to know that there was no ground for the return of the indictment as to one of the defendants, for it must be assumed that the same evidence was adduced upon the trial that was offered to the grand jury."

The indictment was assailed by pleas interposed by some of the defendants. The opinion sustaining the pleas rests upon substantial grounds and it does not oppose the general proposition that an exception to a good indictment returned by a lawful grand jury appeals to the sound discretion of the court, and the justice of the case rather than mere technical grounds of objection should be the basis of the court's decision. In that view the court denied the
24 defendant's motion to quash the indictment, and his motion in arrest of judgment will also be denied.

The grounds for a new trial assigned in the third motion are:

1. Irregularities in the proceedings by which the defendant was prevented from having a fair trial.

2. Misconduct of the jury.

3. Insufficiency of the evidence to prove a crime cognizable in this court.

4. Misconduct of the United States attorney.

5. Errors in the rulings of the court during the progress of the trial and in the instructions to the jury, and in refusing instructions requested in behalf of the defendant.

I believe that the trial was fair, that neither the jury nor the United States attorney were guilty of any misconduct, that no error prejudicial to the defendant occurred, and that a second trial would not result in a verdict more favorable to him. The only points raised by the motion which, in my estimation, are of sufficient importance to require an opinion in writing, are those which challenge the jurisdiction of the court and the regularity of the proceedings.

To decide the question as to the jurisdiction of the court it is necessary to determine three subsidiary questions, viz:

First. At what place was the murder committed;

Second. Is that place within the boundaries of a fort over which the Government of the United States exercises military authority;

Third. Did the Government of the United States have exclusive jurisdiction within said boundaries.

The first is a question of fact for the jury to decide; competent evidence was introduced upon the trial and the verdict is a conclusive determination of the fact that the murder was committed within an enclosed and guarded tract of land actually occupied by
25 United States soldiers, known as Fort Worden, the same being a part of the system of fortifications maintained for the defense of Puget Sound. By documentary evidence and court records it was proved that the Government by purchases made, and condemnation proceedings, acquired land on which to establish said fort, and I hold that the validity of the title so acquired the identification and definite location of the land and the accuracy of its boundaries, are matters within the scope of the powers and duties pertaining to the executive branch of the Government to ascertain and settle, and not subject to judicial scrutiny in the trial of a criminal case. By this I mean that the property rights and the authority of the National Government, within defined boundaries, cannot be disputed in a collateral proceeding by an individual not pretending to have adverse rights or superior authority. As to all such matters the courts respect the authority asserted by the political department of the Government. (James G. Swan, 50 Fed. Rep., 108; Jones v. United States, 137 U. S., 202; 11 Sup. Ct. Rep., 80; Benson v. United States, 146 U. S., 331.)

The constitutional provisions and laws applicable to this branch of the case are as follows:

The 8th section of Article I of the Constitution of the United States vests in Congress power to provide for the common defense and general welfare of the United States; and "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings."

The legislature of the State of Washington consented to the acquisition of lands for the public uses of the United States, including the erection of forts, and ceded to the United States jur-
26 isdiction over all such lands as may have been or may be hereafter acquired by purchase, or by condemnation, or set apart by the General Government for any or either of the purposes aforementioned by statutes enacted Jan. 23, 1890 and Feb. 24, 1891. See Laws of Wash., 1890, p. 459; Laws of Wash., 1891, p. 31; Pierce's Code,

ed. of 1905, p. 1630–31. The text of the later of these two statutes is as follows:

"That the consent of the State of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this State relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this State, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this State or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of Congress and all deeds, conveyances of title papers for the same shall be recorded, as in other cases, upon the land records of the county in which the land so acquired may lie; and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions of any public land belonging to the United States which may be set apart by the General Government for any or either of the purposes before mentioned by an order patent or other official document or papers describing such land; the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of Congress in such cases made and provided and the jurisdiction of this State is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation or set apart by the General Government for any or either of the purposes before mentioned: Provided, That this State shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this State against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract may be executed therein in the same manner and with like effect as though this assent and cession had not been granted."

Congressional authority for acquiring the site for Fort Worden is found in acts making appropriations for fortifications and coast defenses. By an act approved June 6, 1896, $500,000.00 was appropriated for the procurement of land or rights pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defenses (29 U. S. Stat., 257).
27 Other appropriations were made for similar purposes by acts approved March 3, 1897, id., p. 641; May 7, 1898, 30 U. S. Stat., 400; March 3, 1899, id., p. 1250.

Under general authority conferred upon the Secretary of War by Congress (U. S. Compiled Stat., 1901, p. 2518; 26 U. S. Stat., 316) these appropriations were expended by military officers subject

to the direction of the Secretary of War, and the United States attorney has furnished me with transcripts of records of the War Department showing that out of these appropriations the necessary sums were allowed for the specific purpose of paying for the site of Fort Worden.

The question as to the exclusiveness of national authority over Fort Worden is distinct and separable from the more comprehensive question as to the general scope of national authority by reason of the fact that the definition of murder as a crime against the Government of the United States, if committed within a State, includes locality as an essential element, the guilty act must have been committed at a place within the exclusive jurisdiction of the *the* United States, so that exclusiveness of jurisdiction of the National Government is an element of the crime and one of controlling importance affecting the jurisdiction of the court to deal with the murderer.

Early in the history of our Government Mr. Justice Story expounded the 17th paragraph of the 8th section of Article I of the Constitution in the case of the United States v. Cornell (Fed. cases Nos. 14867, 14868). He decided that the phrase "exclusive legislation" comprehended the idea of exclusive jurisdiction and that when a purchase of land for any of the purposes enumerated in that clause "is made by the National Government, and the state legislature has given its consent to the purchase, the land so purchased by the very terms of the Constitution ipso facto falls within the exclusive legislation of Congress and the state jurisdiction is completely ousted. This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation, and the consent of the state legislature is by the very terms of the Constitution, by which all the States are bound, and to which all are parties, a virtual surrender and cession of its sovereignty over the place."

28 Referring to a clause reserving the right to make service of judicial process of the State contained in the act of the state legislature, consenting to the purchase by the United States Government of a site for a fort, similar in phraseology to the reservation clause in the act above quoted, the learned justice said:

"Not a word is said from which we can infer that it was intended that the State should have a right to punish for acts done within the ceded lands. The whole apparent object is answered by considering the clause as meant to prevent these lands from becoming a sanctuary for fugitives from justice for acts done within the acknowledged jurisdiction of the State. Now, there is nothing incompatible with the exclusive sovereignty or jurisdiction of one State that it should permit another State, in such cases, to execute its processes within its limits. And a cession, or exclusive jurisdiction, may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession and as an agreement of the new sovereign to permit its free exercise as quoad hoc his own process * * *; and we have not the least hesitation in declaring that

a true interpretation of the present proviso leaves the sole and exclusive jurisdiction of Fort Adams in the United States."

Justice Story's interpretation, as quoted, harmonizes with the decision of the Supreme Court in the case of Benson v. United States (146 U. S., 326). In that case it was further held by the Supreme Court that without proof of any affirmative act of acceptance by the National Government acceptance of the cession of jurisdiction was to be presumed.

From the laws and proceedings above set forth and the authorities cited, I draw the conclusion that the Constitution vests in the National Government exclusive jurisdiction over places occupied and used for military purposes when a site has been acquired with the consent of the legislature of the State: that the legislature of this State consented in advance to the acquirement of sites for forts and military posts when authorized by Congress; that acting under authority conferred by Congress officers of the United States Army, under the direction of the Secretary of War, selected the site of Fort Worden and have constructed thereon fortifications and defensive works, and that at the time of the commission of the crime of which the defendant is accused the fort was occupied by soldiers of the United States
29 Army and in use as a military post, and that by the verdict of the jury it has been conclusively determined that said crime was committed within the boundaries of said fort, and therefore at a place within the exclusive jurisdiction of the United States.

The alleged irregularities in the trial of the case consist of the action of the court in permitting the jurors to separate during adjournments and recesses and in the refusal of the court to exclude the jury from the court room, when requested to do so by the defendant's counsel, in order to permit them to present motions and argue questions of law without the presence and hearing of the jurors. There was no departure from the practice of this court, which has been uniform during the period of nineteen years since it was organized, and although different from the practice in some other courts, nevertheless I am fully convinced that no legal or prejudicial error was committed. The most that can be hoped for from juries in the way of justice and the maintenance of individual rights and the upholding of the laws of the land is that they shall be composed of intelligent, fair-minded, honest men, who have respect for the laws and courage to stand for the principles which they believe in; that the proceedings in criminal trials in which they participate shall be conducted without passion or prejudice and with a purpose to elicit the truth and render true and just verdicts. I deny that in order to be fair towards an accused person, whether he be in fact guilty or innocent, it is necessary or proper to imprison jurors as if they were culprits, or to continually insult their intelligence by excluding them from the hearing of any motion or argument which it is proper for the presiding judge to hear on a mere supposition that prejudice may be germinated in their minds by hearing the contentions of counsel and the rulings of

the court. To so hold it would be necessary to presume that jurors are incapable of understanding rightly what they hear during the progress of a trial and of discriminating between things that are proper and improper in the application of the law to the facts
30 which they must ascertain, or that by reason of their lack of mental acumen or moral virtue they are objects of suspicion and unfit to be entrusted with the determination of rights dependent upon law and legal evidence. This expression of ideas may shock fogyism, but I believe that it will meet with the approval of conservative believers in the virtue of the jury system, and that it accords with sound principles of jurisprudence. Holding these views, I cannot convict the court of any irregularities entitling the defendant to a new trial.

C. H. HANFORD, *Judge.*

(Endorsed:) Opinion. Filed U. S. Circuit Court, Western District of Washington, Mar. 4, 1909. A. Reeves Ayres, clerk. W. D. Covington, deputy.

31 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA
*vs.* No. 1682.
JAMES H. HOLT.

*Sentence.*

Comes now this 8th day of March, 1909, the said defendant, James H. Holt, into open court for sentence, accompanied by his counsel Caldwell & Riddell, and being informed by the court of the indictment herein against him and of his conviction of record herein, he is asked by the court whether he has any legal cause to show why sentence should not be passed and judgment had against him. He nothing says save as he before hath said.

Wherefore, by reason of the law and the premises, it is considered by the court, that the said defendant, James H. Holt, be punished by being imprisoned in the United States Penitentiary at McNeils Island, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the period of his life, or until he shall be otherwise discharged by due process of law.

And the said defendant, James H. Holt, is now hereby ordered into the custody of the United States marshal for this district, to carry this sentence into execution. To the foregoing sentence the defendant, through his counsel, here and now excepts, and his exception is allowed.

Entered in judgment and decrees. Circuit Court, vol. 1, page 105.

32 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. } No. 1682.

*Defendant's proposed bill of exceptions.*

I, C. H. Hanford, United States district judge, presiding in the above-entitled court, and the judge before whom this case was tried therein, do hereby certify and authenticate the following matters as matters occur'ing in the trial thereof, from December 10, 1908, to March 8, 1909, and now constitute the same a bill of exceptions herein:

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33b (In the examination of the jury on voire dire the following questions were propounded to jurors, and the following objections made thereto, the rulings thereon, and exceptions noted:)

NELS TENNISON, called as a juror, and being first duly sworn to answer questions touching his qualifications to act as a juror testifies as follows:

By Mr. TODD:

Q. Have you any conscientious scruples against the imposition of the death penalty in a proper case?

Mr. CALDWELL. The defendant objects to that question, on the ground that it is rendered immaterial by the passage of the act of Congress of January 15th, 1897, relating to the death penalty in cases of this nature.

(Argument on objection.)

The COURT. I overrule the objection.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

A. No.

(The same question was asked each and every venire man, as to whether he had and conscientious scrupples against the imposition of the death penalty; to each and every one of said questions the defendant duly objected upon the same ground as stated in the examination of the aforesaid Nels Tennison, and each of said objections was overruled and an exception allowed to the defendant. To each and every one of said venire men who answered said question in the affirmative, the court sustained a challenge for cause.

The defendant exercised each and every one of his twenty (20) peremptory challenges before the jury which tried the case was finally selected and sworn.)

34 JOHN GILCHRIST, called as a juror, being first duly sworn touching his qualifications to act as a juror, testified as follows:

Direct examination by Mr. TODD:

Q. I didn't catch your name.

A. Gilchrist.

Q. How long have you lived in Snohomish County?

A. Oh, I have been, my present residence, 24 years; I have been in the county a good deal longer.

Q. Where did you live prior to that time?

A. Well, I have been in Snohomish County, Island County, and Skagit County.

Q. Where were you born?

A. Canada.

Q. Where next?
A. In Washington.
Q. In the Territory of Washington?
A. Yes, sir; the Territory of Washington.
Q. Did you ever hear or read about this case?
A. Yes.
Q. Ever talk with anybody about the case?
A. Well, not recently. I suppose I have passed remarks when I read the account of it.
Q. You didn't talk with anybody who purported to be a witness in the case, or who knew anything about the facts in the case of his own knowledge?
A. No.
Q. Only with people similarly situated as yourself, who read the newspapers?
35 A. Yes, sir.
Q. Did you form any opinion as to the guilt or innocence of James Holt?
A. Well, I took the paper's statement as though it was a fact.
Q. Did you remember at this time the facts that were stated therein?
A. Well, I could not say that I could itemize them; but as a general thing, my memory is pretty good, I think.
Q. Have you at the present time any opinion as to the guilt or innocence of the defendant?
A. Nothing more than just what the paper stated.
Q. Mr. Gilchrist, can you lay aside whatever opinion or impression you got from reading the newspaper and try this case solely upon the evidence given in this court room?
A. The evidence would change it very easily.
Q. I mean, can you lay aside whatever opinion or impression you may have and decide the case solely upon the evidence given in the court room?
A. Yes, sir.
Q. Do you know the defendant?
A. No, sir.
Q. Do you know his attorneys?
A. I think not.
Q. You think, if taken as a trial juror, you can try the case solely upon the evidence, fairly and impartially under the instructions of the court as to the law?
A. Yes, sir; I think I can.
Q. And in that case render a fair and impartial verdict?
A. I think so.
Q. Have you any conscientious scruples against capital punishment?
36 A. No; I have not.

Examination by Mr. CALDWELL:

Q. Mr. Gilchrist, you said that the opinion which you formed from the newspaper was such an one as could be removed by evidence?

A. Yes, sir.

Q. Would it take some evidence to remove the opinion which you have formed?

A. Well, yes; I would not remove it now without any evidence.

Q. It would require some evidence to change the opinion which you have formed?

A. Yes, sir.

Mr. CALDWELL. I challenge him for cause.

Mr. TODD. I resist the challenge.

Examination by the COURT:

Q. Mr. Gilchrist, on this trial if the evidence failed to prove the same state of facts which you read, would you decide the case according to what the newspaper published or decide it according to the evidence, or lack of evidence, on the trial?

A. The evidence on the trial.

The COURT. I deny the challenge.

Mr. CALDWELL. We ask for an exception.

The COURT. Exception allowed.

Examination by Mr. CALDWELL resumed:

Q. Mr. Gilchrist, have you ever been a peace officer?

A. No.

Q. Have you ever sat as a juror in a case prior to this time?

A. No; not in a criminal case.

Q. Never sat in a criminal case?

A. No.

37 Q. When was the last time you sat in a civil case?

A. Thirteen or fourteen years ago. I think I never sat but in one case.

Q. When you come to this country, did you come right to the State of Washington?

A. No, sir; to California.

Q. How long were you there?

A. About a year.

Q. And then to Washington?

A. Yes.

Q. And you have been in this State ever since?

A. Yes.

Q. Have you ever been a prosecuting witness in any criminal case?

A. No.

Q. Ever felt that any person had committed a crime or misdemeanor against you?

A. Well, I have had parties steal property from me. I don't know whether you would term that——

Q. The fact that some one stole property from you, or committed any other crime against you—would that effect your attitude in this case at all?

A. No, sir; it would not.

Q. Have you any bias or prejudice against an enlisted soldier in the United States Army?

A. No.

Q. Do you know Mr. Todd, the district attorney?

A. No.

Q. Or any person connected with his office, so far as you know?

A. No; not so far as I know.

38 Q. Are you acquainted with the United States marshal, or any of his deputies?

A. Not that I am aware of.

Q. Do you know any of the secret service officers of the United States?

A. Not that I am aware of. I might be acquainted and not know it.

Q. Have you sat as a juror prior to this time in this term of court?

A. No, sir.

Q. When you read about this case, did you talk about it with anybody?

A. Oh, several. There are two or three men around my place all the time, and we generally pass remarks about anything.

Q. You exchanged opinions about the facts set forth?

A. Yes; just about it around there.

Q. Do you recall the opinions that were expressed? I don't want you to state them; just whether you recall the opinions.

A. We merely expressed what was in the paper, mentioned to one another what we read.

39 Q. You are a man of family?

A. Yes, sir.

Q. Do you still believe that the statements which you saw in the paper were true?

A. Well, I don't know whether they are or not.

Q. You would require some evidence to change your belief in the matter?

A. It would require evidence; yes, sir. If there was no evidence submitted to me I would have to take what I saw in the paper.

Mr. CALDWELL. We would like to interpose a challenge for cause.

Mr. TODD. I resist the challenge.

The COURT. The challenge is denied.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

(Mr. Gilchrist excused on defendant's peremptory challenge.)

(The foregoing is all of the examination of John Gilchrist on voir dire.)

JOHN F. AUSTIN, called as a juror, and being first duly sworn to answer questions testing his qualifications to act as a juror, testifies as follows:

Q. (Mr. Todd). Have you any conscientious scrupples against capital punishment?

A. Yes.

Mr. TODD. I challenge the juror for cause.

Mr. CALDWELL. We resist the challenge.

The COURT. Challenge sustained. You are excused from this case.

Mr. CALDWELL. Defendant excepts.

The COURT. Exception allowed.

Mr. CALDWELL. I will also state that the exception is based
40 upon the statement previously made on the trial of the case, on the statute of 1897.

JOHN K. MILLER, called as a juror, being first duly sworn to answer questions touching his qualifications to act as a juror, testifies as follows:

Q. Have you any conscientious scrupples against capital punishment?

A. Well, that is the death penalty you are referring to?

Q. That is the death penalty.

A. Well, not if the crime is committed and witnessed by two or more parties.

Q. Have you any scrupples against capital punishment where the evidence is circumstantial?

A. I have.

Mr. TODD. We challenge him for cause.

Mr. RIDDELL. We oppose the challenge.

The COURT. The challenge is sustained.

Mr. CALDWELL. We desire to except.

The COURT. Exception allowed.

41 December 11th, 1908, at 10 o'clock a. m., trial is resumed pursuant to adjournment, all parties being present. Jury called.

The COURT. The court directs that all the witnesses in this case withdraw from the court room at the present time.

(Witnesses retiring from the room.)

The COURT. Now, I have excluded the witnesses, but I am unwilling to exclude the jury from any part of the proceedings in this trial. If there is any reason to be shown why this jury should not be sworn in now to try the case I will hear what it is.

Mr. CALDWELL. If the court will consent, I would like to state, in the presence of your honor and the district attorney, the reason which we have in asking that the jury be excluded, as well as the witnesses; and in that way, certainly no error can be committed; whereas, the other way, we feel that error will be committed if we are compelled to present this matter with the jury here.

The COURT. I have yet to learn that it is error for the court to hear any matter pertaining to the trial with the jury present.

Mr. CALDWELL. Our position is, that it will be error if any matter goes before the jury which is improper for them to consider, and that is the reason we desire them excluded from the room until we can decide the question of whether the matter is proper, or improper; and, of course, if it is proper, the jury are not only entitled to, but will hear the entire matter.

The COURT. If you have got anything to say I will hear you now.

Mr. CALDWELL. Only in the presence of the jury your honor will hear it?

The COURT. I will make no order excluding the jury, and they are here, and have a right to remain.

Mr. CALDWELL. May I state to your honor and the district
42 attorney, on one side out of their hearing?

The COURT. I am unwilling to have any mystification about this trial. If there is anything that is secret and improper for the jurors to hear, it has no place in the trial. The things the jury will imagine will be ten times more prejudicial to your client than to be out with what it is.

Mr. CALDWELL. We are willing that everything proper should go before the jury, and what is improper, that there should be no error, they should be excluded from hearing.

The COURT. Then we will have to lock this jury up all the time. You have addressed the jurors to decide the case on what is proper.

Mr. CALDWELL. The court would not permit improper evidence to go before the jury, and then leave it to them as to whether or not they should consider it, or reject it?

The COURT. Certainly not.

Mr. CALDWELL. That is the proposition presented by this matter.

The COURT. You can't offer any evidence until the jury will be sworn. What you say to me will not be evidence.

Mr. CALDWELL. No, but it may effect the jury if said in their presence, just the same as if some one would talk to them on the outside.

The COURT. I will retain the jury, without debating any further.

Mr. CALDWELL. We ask an exception to your honor's ruling.

The COURT. Exception allowed.

Mr. CALDWELL. The matter which we desire to bring up at this time is a motion for leave to withdraw the plea entered on June 15th last, and to enter a motion in the nature of a plea in abatement, a motion to quash the indictment.

We waited until after the panel had been selected, that the
43 venire might not be present and be influenced or affected by the statements or arguments on the motion. And the motion is based upon an affidavit which I would like to read, in order that the record may show it.

The COURT. Pass it up to me and I can see what is in it quicker.
(Court read affidavit, which is as follows:)

In the United States Circuit Court for the Western District of Washington, Northern Division.

THE UNITED STATES OF AMERICA,
*Western District of Washington, ss:*

UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. } No. 1682.

UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
THOMAS H. KNIGHT AND JAMES H. HOLT, DEFENDANTS. } No. 1683.

*Affidavit of Hugh M. Caldwell and C. F. Riddell.*

STATE OF WASHINGTON,
*County of King, ss:*

HUGH M. CALDWELL and C. F. RIDDELL, being first duly sworn, on oath depose and say, each for himself:

That he is one of the attorneys for the defendant, James H. Holt, in this case; that the indictment herein was found at the May term of court, 1908; that one of the witnesses before the grand jury upon whose testimony this indictment was made is Captain Harry W. Newton; that affiants, in their investigation of the facts in this case, have been informed by said Harry W. Newton that said Newton before said grand jury testified that this defendant had admitted to him complicity in the murder of the deceased, Henry E. Johnson; that affiants have been told by said Newton that prior to the making of said alleged incriminating statements inducements
44 had been offered defendant and threats made to him by said Newton, Capt. R. P. Reeder, Dr. E. H. Porter, and Capt. J. R. Harris; that at the time of the making of said alleged incriminating statements and of the making of said threats and inducements, defendant was an enlisted man in the United States Army; that said Newton, Reeder, Porter, and Harris were his superior officers and that said Newton and Porter were members of a military board charged with investigating the circumstances of said murder and turning over to the civil authorities for punishment the persons believed by them to be the guilty parties, along with the evidence in the case; that before said alleged incriminating statements were made defendant was threatened with death; was told that other persons implicated in the alleged crime had confessed; that he should confess and not bear the whole burden of guilt; and affiants are informed that said Newton also promised the defendant that if de-

fendant would confess the crime he (Newton) "would be as good a friend to him in the matter as he could;" that on June 15th, 1908, defendant entered his plea of not guilty; that subsequent to the entry of plea herein and not before were affiants able to obtain a statement of the circumstances attending the making of said alleged statements, and that the investigation by affiants of the circumstances attending the making of said alleged incriminating statements was not concluded until November 12th, 1908, although the same was pursued diligently by affiants; that aside from the testimony aforesaid very little testimony implicating the defendant in the murder of Henry E. Johnson was presented to said grand jury.

Wherefore affiants pray for leave to withdraw the plea of not guilty herein, to enter a motion to quash the indictment and plea in abatement, and that the court examine said Newton, Porter, Harris, and Reeder, witnesses now in attendance on this court, and any others found necessary, in order to determine whether the
45 indictment has been legally found.

C. F. RIDDELL.
HUGH M. CALDWELL.

Subscribed and sworn to before me this 10th day of Dec., 1908.

[NOTARY SEAL.] JOHN L. ROCKWELL,
*Notary Public in and for the State of Washington, residing at Seattle.*

The COURT. I understand the affidavit, now you may argue the matter just as if the affidavit had been read.

Mr. CALDWELL. It is the affidavit of Hugh M. Caldwell and C. F. Riddell, filed at this time.

The COURT. While I am hearing this argument the jurors are at liberty to retain their seats if they want to, but you can be at ease; if you want to go outside, you may. You are not excluded from hearing it.

Mr. CALDWELL. It is understood we are allowed an exception to that ruling.

The COURT. Exception allowed.

(Argument on motion by Mr. Caldwell.)

The COURT. If it were necessary to protect the rights of this accused person, who is brought here now for trial, I would disregard any technical ruling which would exclude the plea in abatement after his plea of "not guilty," and allow him to withdraw his plea and go back and go through the proceedings anew, so as to guard every right. But this motion is based upon the assumption that improper and incompetent evidence has been made the basis of the indictment. Now the court is here to see that this trial jury is not called upon to pass upon facts supported only by incompetent or improper evidence. All that will be passed upon by the court during the trial, and the case will be submitted to this jury, or whatever jury
46 is finally sworn to try the case, upon only such evidence as the court deems to be legal and proper evidence. If there is not

any to support the indictment there will be none to support a verdict of guilty, and the matter can be as well threshed out now as to go back and call another grand jury and have the matter investigated and brought up again, and let the grand jury really pass upon whether the defendant is guilty or not instead of a trial jury.

If this matter had been urged at the proper time the court would have been obliged to pass upon the question of the competency of the evidence which the grand jury acted upon. But that time is passed, and I don't see any good reason for departing from the regular method of procedure to try the case out. I deny the motion.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

Mr. CALDWELL. We ask then that the jurors who have been selected, but not sworn, be discharged, and a new panel drawn, that we may obtain those in whose presence no statement has been made such as we have just been compelled to make in their presence by the court.

The COURT. Your request is denied.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

(And thereupon the jury was sworn to try the case.)

47 During the opening statement of the prosecutor to the jury prosecutor stated that on the day when the body of the deceased was found the defendant was held by the military officers of the fort, and that while so held he (Holt) was taken over to the hospital, his coat with the soot marks on it were shown to him, and he voluntarily admits that that is his coat. His gunner's badge is shown to him, and he admits that is his gunner's badge, the badge found upon the blue blouse all burned together in the furnace. But he denies at that time knowing anything about the crime. That was Saturday afternoon. On Monday morning, while he was over in the hospital having his photograph taken and finger prints taken, he says to Captain Newton, "Captain, there is something I would like to say to you alone."

Mr. CALDWELL. May it please the court, we object to the introduction of any statements here as to what the defendant Holt had said after he was arrested, on the ground that while they can be explained we should not be put to the trouble, time, and the burden of explaining them, or disproving them, as the case may be.

Mr. TODD. These are voluntary confessions. I am perfectly willing to omit them till the proper time comes, if counsel objects to them at this time. Therefore, gentlemen of the jury, I will not relate to you at this time anything that Holt said afterwards, voluntarily or otherwise.

Mr. CALDWELL. We except to the language of the prosecutor in stating that Holt made any confessions.

The COURT. I didn't hear him say that he did.

48 Mr. TODD. Take your exception.

The COURT. You may have your exception.

(There was no evidence admitted that defendant made any confession or confessions.)

49 M. C. BUCKEY, a witness produced on behalf of the plaintiff, being first duly sworn, testifies as follows:

Direct examination by Mr. TODD:

Q. Your initials, Captain, are M. C.?

A. M. C.

Q. What is your occupation, Captain?

A. I am district artillery engineer for the artillery district of Puget Sound.

Q. Where are you stationed?

A. Fort Worden, Washington.

Q. Are you an officer in the United States Army?

A. I am.

Q. State what that map is which I show you [handing witness a map].

A. This map is a map prepared in my office of the reservation of Fort Worden.

Q. What is the name of that reservation?

A. Fort Worden, Washington.

Mr. RIDDELL. I would like to ask a question.

Cross-examination by Mr. RIDDELL:

Q. How do you know that is Fort Worden, Captain?

A. This map is a blueprint prepared from a tracing that was made from an official map in my possession.

Q. You haven't the official map here?

A. No. This is an official blueprint from the tracing in my office.

Q. Where did that tracing come from, Captain?

A. That tracing was a tracing that was made for other official purposes from a tracing of the map furnished by the Engineers' Department.

Q. Do you know that that other map is correct?

A. I assume it is correct from the manner in which it was
50 received.

Q. From whom did you get it?

A. It was obtained—the particular map was not obtained by me, but was found by me as one of the records of the office upon my arrival, and has been used for official purposes heretofore.

Mr. RIDDELL. Mr. Todd, what is the purpose of this?

Mr. TODD. Simply to prove that Fort Worden is a military reservation in the exclusive jurisdiction of the United States. I presume the court will take judicial cognizance of it.

Mr. RIDDELL. We object to the court taking judicial notice of it, and object to this method of proof. It is not a proper method of proof. The laws of the State of Washington granting consent of the State of Washington to the exercise of exclusive jurisdiction by the United

States is only in cases where the United States has acquired territory by a purchase or by a condemnation.

Mr. TODD. I am going to follow this up with deeds and decrees of condemnation.

The COURT. The objection is overruled.

Mr. RIDDELL. We ask an exception.

(Exception allowed.)

Mr. TODD. I offer this map in evidence as plaintiff's Exhibit A.

Mr. RIDDELL. We object.

The COURT. The objection is overruled.

Mr. RIDDELL. We ask an exception.

The COURT. Exception allowed.

Direct examination continued:

Q. (Mr. TODD.) State what part of that map which is in white, what that is.

A. The portion of this map that is in white is that portion that is occupied by the fortifications implaced at Fort Worden.

51 Q. Why is that put in that shape in this map?

A. It is put in that shape in order to keep the fortifications of Fort Worden confidential.

Q. That is simply not to reveal where the fortifications are?

A. Not to reveal the actual location of the fortifications, yes, sir.

Q. Under the orders of the War Department?

A. Yes, sir.

Q. Otherwise, that shows the quarters of the military reservation, and the fort?

A. Otherwise this map shows the entire Fort Worden Reservation.

(Blueprint marked "Plaintiff's Exhibit A," received in evidence.)

Q. I show you a book entitled "United States Military Reservations and National Cemeteries and Military Parks, compiled in 1904," and I will ask you under whose authority that book is prepared?

(The title of the book from which said Buckey testified as shown by the title page of said book, is in full as follows: "United States Military Reservations, National Cemeteries and National Parks. Title, jurisdiction, etc. Prepared in the office of the Judge-Advocate-General. Revised edition by 1st Lieut. Charles E. Hay, jr., 24th U. S. Infantry. Washington. Government Printing Office. 1904.)

A. This book was prepared in the office of the Judge-Advocate-General.

Q. Under the authority of what department?

A. That is the department, from the War Department.

Q. Turn to the part of that book relating to the Fort Worden Military Reservation?

A. At page 389 of this book, "Fort Worden with its titles for the property" appears.

Mr. TODD. If the court please, I understand this is simply a question for the court, whether Fort Worden is a military reservation, and the court, being satisfied by the evidence of that, will instruct the jury whether a certain event took place on the Fort Worden Military Reservation as a fact for the jury. But the court takes notice of its own jurisdiction, and that is a matter for the court to determine. I offer this book in evidence for the consideration of the court alone.

52 Mr. RIDDELL. To refresh the memory of the court?

Mr. TODD. Yes, to refresh the memory of the court.

Mr. TODD. I offer in evidence certified copies of the records of the auditor of Jefferson County, being the deeds and decrees in condemnation, referred to in that book.

Mr. RIDDELL. I object to that method of proving title, may it please the court. The book itself is not any evidence. The question as to whether or not the Fort Worden Military Reservation is placed under the exclusive jurisdiction of the United States is a question for the jury alone, and the United States Supreme Court has so held in the case of the United States versus Jackallow in first Black.

The COURT. The objection is overruled to the offers and the documents may go in evidence.

Mr. RIDDELL. We desire an exception.

The COURT. An exception allowed.

(Book marked "Plaintiff's Exhibit B" received in evidence.)

Q. Captain, will you just read off those deeds to me, please?

A. The first deed is from Francis W. James to the United States, dated April 14, 1897.

Mr. TODD. I offer in evidence the deeds certified to by the auditor of Jefferson County of Francis W. James, recorded in vol. 36 of deeds, page 265 of the records of the auditor of Jefferson County, being marked "Plaintiff's Exhibit C."

Q. What is the next?

A. From Samuel B. Harned to the United States, dated May 6, 1897.

Mr. TODD. I offer in evidence the deed from Samuel B. Harned to the United States, recorded in vol. 36 of deeds, page 263,
53 duly certified to by the auditor of Jefferson County, marked "Plaintiff's Exhibit D."

WITNESS. The next is from T. B. Wilcox to the United States, dated June 5, 1897.

Mr. TODD. I offer in evidence deed from T. B. Wilcox to the United States, dated June 5, 1897, recorded in book 36 of deeds of the records of Jefferson County, at page 264, duly certified to by the auditor of that county, as plaintiff's Exhibit E.

WITNESS. Deed from Louisa Stall to the United States, dated April 17, 1897.

Mr. TODD. I offer in evidence plaintiff's Exhibit F, being a deed from Louisa Stall to the United States, recorded in vol. 36, page

267, of the records of the auditor's office of Jefferson County and duly certified to by the auditor of that county.

WITNESS. Deed from Mary Thompson and husband, et al., to the United States, dated June 14, 1897.

Mr. TODD. I offer in evidence the deed from Mary Thompson and husband to the United States, recorded in vol. 47 of the deeds, page 295, duly certified to by the auditor of that county, as plaintiff's Exhibit G.

Q. The next?

A. Deed from Walter C. Smith and wife to the United States, dated June 17, 1897.

Mr. TODD. I offer in evidence the deed from Walter C. Smith and wife, recorded in vol. 47 of deed and records of the office of the auditor of Jefferson County, at page 293, as plaintiff's Exhibit H.

Q. What is the next?

A. Deed from the Starrett Estate Co. to the United States, dated May 8, 1897.

54 Mr. TODD. I offer in evidence a deed from the Starrett Estate Co. to the United States, recorded in vol. 47, page 366, of the records of the auditor of Jefferson County and certified to by that officer, same being marked "Plaintiff's Exhibit I."

Q. The next?

A. Deed from Mary J. Tucker and husband, dated June 16, 1897.

Mr. TODD. I offer in evidence the deed from Mary J. Tucker and husband to the United States, recorded in vol. 48 at page 13 of the records of the auditor of Jefferson County and certified by the auditor of that county as plaintiff's Exhibit J.

WITNESS. The next is a deed from the State of Washington to the United States, dated April 4, 1898.

Mr. TODD. I offer in evidence a deed from the State of Washington to the United States, recorded in vol. 48 of deeds and records of the auditor of Jefferson County, at page 16, properly certified to by the auditor of that county and marked "Plaintiff's Exhibit K."

Q. The next?

A. Decree of condemnation of certain acreage of the tide lands in a case, No. 1169, entitled "United States versus Chas. Isenbeis," dated April 7, 1898.

Mr. TODD. I offer in evidence the decree in that cause, No. 1169, in the District Court of the United States for the District of Washington, as duly recorded in the office of the auditor of Jefferson County in book 48, pages 1 to 12, and duly certified to by that auditor, and also by the clerk of the District Court of the District of Washington, as plaintiff's Exhibit L.

Q. The next?

A. Decree of condemnation in a cause entitled "United States versus Helen M. Freeman, et al.," dated January 30, 1902.

55 Mr. TODD. I offer in evidence the duly certified copy of the decree cause, No. 2098, in the United States District Court for the District of Washington, Northern Division, as recorded in

the auditor's office of Jefferson County in vol. 51 of deeds, at page 486, and duly certified to by the auditor of that county and the clerk of the District Court as plaintiff's Exhibit M.

Mr. TODD. These, I understand, are all admitted.

Q. What is the land described in these deeds and in that book used for and how long has it been used—for how long so used?

A. The land described in those deeds is the military reservation of Fort Worden, and has been used for that purpose since about 1902.

Q. For what purpose?

A. For military purposes; military and fortification purposes for the United States Government.

Q. Who, during that period, has exercised jurisdiction over that land?

A. The United States Government.

Q. That reservation is situated near what city?

A. Near the city of Port Townsend.

Q. In what county?

A. Jefferson County, Washington.

Recross-examination by Mr. RIDDELL:

Q. Mr. Buckey, have you any personal knowledge that these deeds cover the land embraced within what you know as Fort Worden?

A. None, except from these official documents.

Q. Did you make that document?

A. I did not.

Q. Do you know whether it is correct?

A. From my personal knowledge; no.

Q. You don't?

56 A. No.

Q. Do you know where Willow st. is in Port Townsend, Captain?

A. No, sir.

Q. Do you know where Cherry st. is?

A. No, sir.

Q. Do you know where Fir st. is?

A. No, sir.

Q. Do you know where 17th st. is?

A. No, sir.

Q. Do you know where Pettigrove's second addition to Port Townsend used to be?

A. Yes, sir; I have seen maps of Port Townsend which show approximately where the Pettigrove addition was.

Q. Do you know whether the streets which I have named are now within the Fort Worden Military Reservation or not?

A. No, sir; I do not.

Mr. RIDDELL. We object, may it please the court, to this method of proving federal jurisdiction over Fort Worden. The witness has no personal knowledge of the facts. It is trying to refresh his memory and testify from a book from which he can not refresh his memory, and he has no personal knowledge whatever; and we object to the

court taking judicial notice of this matter. As a matter of fact, if the court please, the decree which is filed here, the decree in the condemnation, does not condemn a part of the land which is now within the Fort Worden Military Reservation. And if the United States puts somebody on the stand here who has personal knowledge of whether or not that land is included within the Fort Worden Military Reservation, it will show that this court probably has no jurisdiction to try this cause.

The COURT. I presume those papers are admissible in evi-
57 dence. You may make all the objections you want to make to the evidence and have your exception. I am not going to declare now the effect of this evidence, whether it proves anything or not. I am not going to declare that now. All I have to say is that these papers and this evidence is competent and admissible, and it may be considered for what it is worth.

Mr. RIDDELL. We ask that the testimony of the witness as to identifying the land described in these exhibits be stricken from the record on the ground that the witness has no personal knowledge and has not refreshed his memory from a book, which it is proper for him to do so.

The COURT. The motion to strike is denied.

Mr. RIDDELL. Allow us an exception.

The COURT. An exception allowed.

Mr. RIDDELL. One decree in this case condemns a street which is not within the Fort Worden Military Reservation and fails to condemn a street which, at present, is within the Fort Worden Military Reservation, and the witness has no personal knowledge of the matter.

The COURT. You may talk of that. It is not the proper time now to argue the merits of the case. Go on.

Q. How long have you been at Fort Worden?

A. Two years; slightly over two years.

Q. When did Fort Worden first become a military reservation?

A. To my personal knowledge it was a military reservation before 1901.

Q. You were here then?

A. Yes, sir.

Q. And left?

A. Yes, sir.

Q. While you were away was it used as a military reserva-
58 tion by the United States?

A. It was. Guns were then in place. And this additional property was bought after I first saw the reservation.

Q. Were you there when it was bought?

A. No, sir.

Q. You don't know when the United States acquired jurisdiction there?

A. I know about 1902; they were preparing to buy the land at the time I was there in 1901.

Q. Can you testify, Captain, that these deeds cover all the land embraced in this map?

A. I have not run the lines of that map; but the original map from which that was prepared, received in an official manner by my office, was made——

Q. What I want to get at, Captain, is whether you know that the boundaries of Fort Worden as contained in this map are identical with the outside boundaries on all those lines described in those exhibits.

A. I have never run them; I cannot tell you.

Q. You don't know then?

A. No, sir.

Mr. RIDDELL. We ask that the witness' testimony be stricken from the record on the ground that it shows no knowledge.

The COURT. The motion to strike is denied.

Mr. RIDDELL. We ask an exception.

The COURT. Exception allowed.

Redirect examination by Mr. TODD:

Q. I want to ask you a question. The band barracks are on the original part of the reservation, or on that that has been added?

59 A. The band barracks are on that portion of the reservation that has been added.

Q. When was that added?

A. I think that was—the exact portion—I am not positive.

Q. Can you tell from an examination of that official book?

A. It does not show; I cannot.

Q. How long has that part of the reservation on which the band barracks stand been controlled by the United States?

A. Since about 1902.

Q. How long has it been in the possession of the United States?

A. Since shortly after that time.

Q. Has anybody else ever exercised jurisdiction or control over that land since that time?

A. No.

Cross-examination by Mr. RIDDELL:

Q. Do you know, Captain, upon the land covered by which deed the band barracks stand?

A. No, sir.

Q. You don't know from the land covered on which instrument the band barracks stand?

A. No.

Examination by the COURT:

Q. Captain, do you know the actual boundaries of the district over which the commanding officers there exercise military jurisdiction?

A. Yes, sir.

Q. Do you know that outside of any official maps or documents that have been furnished you, from your familiarity with the ground?

60 A. Yes, sir; the artillery commander exercises jurisdiction over four forts in the Puget Sound district.

Q. Just confine it to Fort Worden. Do you know the boundaries of the Fort Worden district that is in his actual military control?

A. Yes, sir.

Q. Is it enclosed by a fence or enclosure?

A. Yes, sir.

Q. Are there guards and sentries who exclude unauthorized people from entering those grounds?

A. Yes, sir.

Q. Is that constant, day and night?

A. Yes, sir.

Q. Is this band barracks within that enclosure?

A. Yes, sir.

The COURT. Those are all the questions I want to ask you.

Recross-examination by Mr. RIDDELL:

Q. You have no further knowledge, Captain, as to whether the fence that you say you know encloses the reservation is identical with the boundaries of the lines appearing in these documents or map put in evidence?

A. I know from my personal knowledge that that fence practically is coincident with the boundary shown on that map.

Q. On the map?

A. Yes, sir.

Q. How about the boundaries shown on the deeds and decree in condemnation?

A. From the deeds, I don't know of my own personal knowledge.

The COURT. This court will be at recess until 2.00 p. m. (the jury being duly admonished).

(Witness excused.)

61 Tuesday, December 15th, 1908, trial resumed pursuant to recess, all parties present, and the following proceedings were had:

Captain M. C. BUCKEY, recalled in behalf of the United States, testifies as follows:

Direct examination by Mr. TODD:

Q. You have already been sworn, Captain?

A. Yes, sir.

Q. Have you, since Friday last, made an examination of the original maps of the reservation known as Fort Worden Military Reservation for the purpose of locating the band barracks with reference to the former addition there?

Mr. CALDWELL. I object to that. I don't consider that question as the proper way in which to prove the federal jusisdiction over that

place. The indictment lays the offense as having been committed within Fort Worden; and proof of any particular spot within that fort, until there is some objection against it, is immaterial. He can't prove any particular spots. The question is, whether there is federal jurisdiction over a certain place called Fort Worden. We object also to this witness testifying further, he having completed his testimony and was cross-examined, to his going out and looking up additional information, and coming in and testifying further. All the witness' testimony should have been put in when he was examined in chief. This, in effect, is permitting a redirect examination of matters not gone into on cross-examination.

The COURT. Not redirect: this is recalling the witness.

Mr. CALDWELL. I said the effect was to permit him to go into matters that he should have been called upon to go into upon his direct examination. There will be no end to witnesses going out and coming back and testifying a half a dozen different times.

62 The COURT. I will put an end to it, if it is carried on too far. The court overrules both objections.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

Q. The land now occupied as the band barracks at Fort Worden was described in the land acquired in what particular description?

A. In the condemnation proceeding, 1169, I think.

Q. What was the description of the land acquired in this condemnation proceeding with reference to this particular piece of land?

A. It was blocks 14, 15, 20, and 21.

Q. What addition?

A. The Juan de Fuca addition to Port Townsend.

Q. Any streets included?

A. Eighth and Indiana.

Q. Are those streets included within the decree in that condemnation suit?

A. They are.

Cross-examination by Mr. RIDDELL:

Q. You learned these facts how, Captain?

A. I determined these facts from a consultation with the original maps of the reservation showing the different subdivisions on file in the engineer's office in Seattle.

Q. Did you make those maps?

A. No, sir; not the maps. I made the computations from the maps, and located the center of the band barracks as the intersections of Eighth and Indiana streets in the Juan de Fuca addition to Port Townsend.

Q. You haven't those maps here?

A. No, sir; I haven't.

63 Q. You are simply testifying that you went some place and looked at some maps?

A. I went to the official custodian of the maps, and by his permission I made these computations.

Q. Did you make those maps?
A. I did not.
Q. Who did?
A. I don't know who made them. They were made over ten years ago, in some instances.
Q. Was the band barracks located there over ten years ago?
A. No.
Q. You don't know that those maps are correct then, do you?
A. I assume they are correct.
Q. Wait a minute, Captain; do you know that they are correct?
A. No; I didn't make them.
Q. That is not answering the question. Do you know that they are correct; have you any personal knowledge that they are correct?
A. I have no personal knowledge that they are correct.
Mr. RIDELL. We ask that the witness' testimony be stricken.

Examination by Mr. TODD:

Q. What maps were those, Captain?
A. Those were official maps on file in the engineer's office.
Q. In what engineers office?
A. Engineering office of this district; United States Engineering Office.
Q. Made under authority of what department?
A. Of the Engineering Department of the United States Army.
Q. That is a part of the War Department of the United States?
A. Yes, sir.

64 Cross-examination (resumed) by Mr. RIDDELL:

Q. How do you know that, Captain?
A. I know it just as well as anything in the world.
Q. I didn't ask you that. How do you know it?
A. How do I know it?
Q. Yes, sir.
A. Well, I have been dealing with that office—I have known of the office ever since I have been in the army, and I have no intimation to the contrary that it wasn't the proper office.
Q. Well, how do you know that those maps are correct there?
A. Simply that they are the original maps from the original surveys made by that office whose business it is to make them.
Q. How do you know that?
A. Because it is so stated on the maps.
Q. And that is the only way in which you know it?
A. Yes, sir.
Q. Is it certified on the maps under seal of any particular department?
A. No maps are under seal; no. It simply stated that they were maps made under the direction of certain officers of certain portions of the reservation.

Mr. RIDDELL. We ask that his testimony be stricken on the ground that the witness has no knowledge, and the maps haven't been introduced in evidence, or shown to be correct.

The COURT. If I brought you on cross-examination, and showed you a map of the United States, and asked you how you know that is a map of the United States, you could not tell, yet everybody would know it from the looks of it.

65 (The foregoing is all the evidence offered bearing on the jurisdiction of the United States over the place where the crime is alleged to have been committed, and includes every statement of the court during the trial, other than the instruction to the jury, as to judicial recognition of the jurisdiction of the United States over Fort Worden.)

(All the evidence indicated that the crime charged in the indictment was committed in said band barracks.)

Dr. E. H. PORTER, produced as a witness on behalf of the United States, being first duly sworn, testifies as follows:

Direct examination by Mr. TODD:

(Dr. E. H. Porter, one of the post surgeons, and a member of the board of inquiry appointed to investigate and determine the identity of the deceased soldier and of the person, or persons, responsible for his death, was shown an olive-drab soldier's blouse, which was admitted in evidence and marked "Plaintiff's Exhibit S.")

Q. (Mr. TODD.) I will ask you, when you saw Holt in the hospital on Saturday afternoon, whether this blouse was shown to him or not?

66 A. Yes, sir: that blouse was shown to him.

Q. Did he make any statements in regard to that blouse at that time, voluntarily?

Mr. CALDWELL. We object to any statements being made by parties as to what was said by the defendant at any time in the hospital on Saturday, or any later time, or while he was in confinement at Fort Worden after his arrest.

Mr. TODD. Before the objection is ruled on——

The COURT. Before the court admits him to repeat any statements that the defendant may have made, interrogate him fully as to the circumstances and conditions under which the statement was made.

Q. Who was there at the hospital at the time that blouse was shown to him?

A. Well, there was the members of the board: I think Captain Reeder, Dr. Harris, and Mr. Burt. I don't remember of anyone else.

Q. Were any inducements offered to him to make any statements?

A. No: none that I heard of.

Q. Were any threats made to him to cause him to make any statements?

A. No.

Q. Were the statements which he made made voluntarily?

A. So far as all I heard.

Q. I will now ask you, Doctor, was he in chains or anything?

A. Why, he was brought to the hospital with a pair of handcuffs on him.

Q. Were those taken off in the hospital?

A. Yes, sir: within a few minutes after he arrived Captain Newton took them off. I say, "a few minutes." He may have been there fifteen or twenty or thirty minutes before Captain Newton took them off.

67 Mr. CALDWELL. We ask at this time that the jury be excused, until the circumstances under which any conversations were had with the defendant, are determined by the court to have been proper or improper.

The COURT. The request is denied.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

Examination by the COURT:

Q. Was he interrogated by anyone?

A. Holt?

Q. Yes, sir.

A. Yes, sir.

Q. Who interrogated him?

A. Captain Newton.

Q. What is Captain Newton's position?

A. He was at that time president of this examination board, to determine who this dead man was and to fix, as far as we were able to, the responsibility of the man's death. We were ordered to do that by an order from the post commander.

Q. Do you know whether, previous to that time, any of the officers, either those who arrested him or the officers in command there, had any interview with Holt on this subject?

A. Well, Judge——

Q. You don't know about that?

A. I don't believe they did: because we were the members of that board: and when the man was arrested down in town he was brought up—well, he was brought up in a wagon of some kind, some conveyance, and turned over to us for examination. And no man that I knew of had ever spoken to Holt regarding the case until he was brought there for examination.

The COURT. At the present time I will sustain this objec-
68 tion. You can renew the offer after this case has been more fully developed, so I can judge better than I can now.

Mr. CALDWELL. We are willing to cross-examine the witness, if the jury retires on the matter.

The COURT. I am not going to send the jury out during any part of this trial.

Mr. CALDWELL. Before the witness is permitted to testify to what took place before this board at any time will we be given an opportunity to cross-examine the witness?

The COURT. Yes, sir.

Direct examination resumed:

Q. (Mr. TODD.) Doctor, I will ask you whether you ever saw that blouse upon Holt?

A. I did at one time.

Q. At what time was it?

A. It was on Saturday afternoon of May 9th.

Q. Where?

Mr. CALDWELL. We object to this on the ground that it is compelling the defendant to be a witness against himself.

Q. I will ask you whether Holt was compelled to put on that blouse?

A. No.

Q. Did he put it on voluntarily?

A. Yes, sir.

Mr. CALDWELL. We renew the same objection to these questions.

The COURT. Objection overruled.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

Q. Did you see the blouse on him that afternoon?

A. I did.

Q. Did, or did it not, fit him?

Mr. CALDWELL. We ask the privilege of cross-examining the
69 witness as to the circumstances under which he put on this coat before the testimony goes in.

The COURT. You may cross-examine.

Cross-examination:

Q. (Mr. CALDWELL.) Who told Holt to put on this blouse?

A. Captain Newton, I think.

Q. A superior officer?

A. Yes, sir.

Mr. CALDWELL. We submit that this fact that the defendant, an enlisted man, was instructed by his superior officer to do a thing, left him no exercise of his own discretion or his own will in the matter, and, in effect, compelled him to do so.

The COURT. Well, that belonged to the same class of evidence as the shoes that a man has on, or his clothing, too, or his measurement, or the color of his hair, the color of his eyes. Witnesses that have made observations of that kind can tell what they were. It is not compelling the accused person to say anything, or speak at all. His identity can be testified to by witnesses that have examined him.

Mr. CALDWELL. Will your honor recognize any distinction between the clothes which he already has on and the clothes he is compelled to put on?

The COURT. No more than I would recognize the distinction between clothes a man has on and a tape line, or rule, to take his measure.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

Mr. CALDWELL. The court's ruling is that a man could be compelled to put this coat on, whether indictments were made, or whether compelled by force, and it could still be used against
70 him.

The COURT. Yes; I will go that far. If he was measured against his will by any system of measurements.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

Mr. TODD. I would like to ask another question.

Direct examination resumed:

Q. (Mr. TODD.) Were any inducements offered to him to put this coat on?

A. No; he was asked if he recognized it.

Q. Don't state that.

The COURT. Omit the conversation entirely.

Q. What request was made to him to put it on?

A. He was asked to try it on.

Q. By whom?

A. I think Captain Newton.

Q. Did he try it on?

A. Yes; he did.

Q. Did it fit him?

(No response.)

Examination by Mr. CALDWELL:

Q. When was this, Doctor, that this was done, that this was put on?

A. It was late in the evening of Saturday, May 9th; I should say half past 4 or 5 o'clock.

Q. Was it after supper?

A. No; I don't think it was. I think it was before supper.

Q. Will you swear that it was not after supper?

A. No; I would not.

Q. Might it have been after supper?

A. It might have been; but I am of the opinion that it was before supper; that it was before we went to our dinner that evening.

71 Mr. CALDWELL. We ask the privilege of cross-examining other witnesses who were present at that time, for the purpose of showing that this took place Saturday night or Sunday, later than the witness has related, and after such inducements and actions and statements were made and had as to render his testimony inadmissible and incompetent.

The COURT. You will have a right to rebut the testimony of this witness on any of those points.

Mr. CALDWELL. We ask the privilege of doing it before it goes in.

The COURT. Request denied.

Mr. CALDWELL. We ask an exception.
The COURT. Exception allowed.

Direct examination resumed:

Q. (Mr. TODD.) And this coat has been in your possession and under your control ever since?
A. It has, until I arrived.

(The evidence showed that the body of the deceased was found in the furnace of the band barracks. The coat or blouse, plaintiff's Exhibit S, had black marks upon it which witnesses testified had the appearance of soot.)

72 R. P. REEDER, produced as a witness on behalf of the United States, being first duly sworn, testifies as follows:

Direct examination by Mr. TODD:

Q. What are your initials, Captain?
A. R. P.
Q. What position do you hold at Fort Worden?
A. I am adjutant of the artillery district of Puget Sound and of Fort Worden.
Q. What position in regard to the band—the Sixth Artillery band?
A. I command the band.
Q. Captain, did you ever see Holt put on this particular olive-drab coat, which is marked as an exhibit here (pl'f's. Exhibit S)?
A. Yes, sir.
Q. When was that?
A. That was the afternoon of his arrest.
Q. Did it fit him?
A. Yes, sir.

Mr. CALDWELL. We note the same objection to that as is made to the testimony of Dr. Porter.
The COURT. The objection is overruled.
Mr. CALDWELL. We ask an exception.
The COURT. Exception allowed.

73 HARRY W. NEWTON, produced as a witness on behalf of the United States, being first duly sworn, testifies as follows:

Direct examination by Mr. TODD:

Q. State your full name.
A. Harry W. Newton.
Q. What is your position in the United States Army?
A. Captain of the Coast Artillery Corps.
Q. Captain of what company?
A. 126.
Q. Where are you stationed?
A. Stationed at Fort Worden, Washington.
Q. Where were you stationed last May?

A. In the same place.

Q. State what connection you had with the investigation and with the death of Henry E. Johnson.

A. On the morning that the body was found I was telephoned for by the adjutant of the post and district notifying me to report at once to the band quarters to the commanding officer. When I arrived there he then notified me that the commanding officer placed me on a board with two other officers to investigate the death of this Johnson, and to fix, if possible, the responsibility.

Q. Who were the other two officers?

A. Captain Abbott and Dr. Porter.

Q. Where is Captain Abbott now?

A. Fort Monroe, Virginia.

74 Captain, I show you herewith an olive-drab blouse, marked for the purposes of identification as "Plaintiff's Exhibit S." Please examine that blouse. [Witness examining blouse.] State to the jury whether you have ever seen that blouse before.

A. Yes, sir.

Q. Where did you first see it?

A. It was given to me by Captain Reeder in the basement of the band barracks.

Q. What was its condition at that time?

A. Well, about as it is now, with the exception of one less black spot on it than it has now.

Q. Where were the black spots on it?

A. On the sleeve and near the shoulder, and also a little on the shoulder.

Q. You said there is one more black mark on that now than there was then?

A. Yes, sir.

Q. Where did that black mark come from?

A. I put it on.

Q. Where did you put it on from?

A. The furnace door.

Q. Which mark is that?

A. That is the upper one on the sleeve.

Q. Point it out.

A. This one here.

Q. That is the one there?

A. Yes, sir.

Q. You put that on yourself, from the furnace door at that time?

A. Yes, sir.

Q. Point it out to the jury.

75 A. This one was here, and I put this one on.

Mr. Todd. This blouse which has been marked "Exhibit S" for identification I now offer in evidence as the Government's Exhibit S.

The Court. It will be admitted.

Q. Captain, did you have any conversation with the defendant after his arrest?

Mr. CALDWELL. We object to anything in relation to any conversation.

Mr. TODD. I am not going to call out what the conversations were at this time. I am going to have the witness tell whether there were any conversations, and the circumstances.

The COURT. I don't see how that can be material unless the jury can infer something from the conversations.

Mr. TODD. I am going to qualify him to put these conversations in. I am then going to offer to show what the defendant said.

The COURT. You said the other day that there were Supreme Court decisions which were to the effect that the Government had a right to prove such conversations.

Mr. TODD. Yes, your honor.

The COURT. Is there anything later than the Bram case?

Mr. TODD. No, sir; nothing later than the Bram case. There have been confessions admitted——

Mr. CALDWELL. I object to the use of the word "confession" by the prosecutor. There is nothing in this case to show that defendant made a confession, and I object to it in the presence of the jury.

The COURT. Nobody said that he did make a confession. We can't curtail the use of the English language by the prosecut-
76 ing attorney. On the hearing he may express himself by words that the court understands and that he understands.

Mr. CALDWELL. We ask, may it please the court, that the jury retire until this matter is passed upon by the court, it being a question simply for the court, and we ask that the jury retire until the matter is decided by your honor here.

The COURT. The motion is denied.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

Mr. TODD. That is the only case, the Bram case, where the Supreme Court held it error to admit a confession of the defendant. In the case of Hopt vs. Utah a confession was made by the defendant while in the custody of a detective who arrested him, after an attempt had been made by the deceased's father to draw a gun upon the defendant. It was held that this confession was admissible. It was also held that the prosecution need not call the policeman in whose custody the defendant had been for a few minutes to prove that nothing had been done to him prior to the time that he made the confession.

In 156 U. S., page 151, the defendant was in irons, and while in irons he made a statement to the captain of a vessel, who was his superior officer, and this confession was held admissible against him as being uninfluenced by any hope of reward or fear of punishment. In Brewster vs. United States, 160 U. S., page 355, admissions were made by defendants while under arrest and handcuffed, and these were held to be admissible, providing the confessions were not ex-

torted by inducements or threats, and it was not shown in that case that they were.

In Wilson vs. United States, 162 U. S., page 615, the
77 defendant was arrested and taken before a United States commissioner at night. There was a mob at the door at that time, and talk of mobbing. The commissioner stated that he could be turned over to the city marshal, to be taken to the jail. He examined him the next day, reading the charges to the defendant and examining him by interrogatories and the defendant answering the questions, that defendant had no counsel, and it was shown that the defendant had no counsel and was not advised of his right or informed that he had a right to answer or not answer. The statements were held to be admissible.

Then came the Bram case, where the defendant in the case was stripped completely, under the coercion of an officer who was a police officer, and coerced into answering a question. The Supreme Court held in that case that it was coercion. Since the Bram case two other cases have confirmed the Hopt case.

The COURT. I want those two cases. I want those. What cases are they?

Mr. TODD. I have the list there. In the cases since the Bram case these cases were referred to. In the Bram case the plaintiff was absolutely stripped of his clothing. He was asked questions that were an admission whether he answered them or not. He understood he was a prisoner and had to do what he was told to do. In this case, if the court please, I would like to have the court——

The COURT. That is not the grounds of the decision—that he was under any such method of constraint as that he supposed he had to do what he was told to do, but as to anything he said.

Mr. TODD. In that case the questions were put to him in such a way that it would be an admission against him if he kept
78 silent and it would be an admission against him if he spoke, and that, as I understand the case, was held to be coercion. In the case at bar, I am satisfied, if the court will allow me to show the circumstances under which any statements were made to Captain Newton, he will hold that the statements of Holt were wholly voluntary and entitled to admission.

Mr. CALDWELL. We take an exception to counsel stating in the presence of the jury that any statements were made to Captain Newton after his arrest, and while held at Fort Worden, on the ground that they are calculated to prejudice and bias the jury against the defendant.

The COURT. Gentlemen of the jury, these remarks of counsel should not be understood as implying that this jury has not got fortitude enough to resist any influence of prejudice that might be created by hearing remarks that are proper to be made to the court in discussing a legal question. You should understand that all through this trial, as the court will instruct you finally, after the evidence is in, that you are to decide this case on the testimony as it comes from the wit-

nesses on the witness stand; not by what counsel say, not by what I say, not by what the newspaper publish, or anything of that kind. I am not excluding you, because I assume that you are men of experience and common sense; that you can sift this matter and decide this case upon the testimony that the court rules and decides to be competent and admissible testimony.

The court will take a recess for a few minutes.

79 (3.15 p. m., same day, court reconvened; jury and all parties present.)

The COURT. Whether the Government has a right to prove anything that the defendant may have said depends entirely upon the circumstances and conditions surrounding any statement he may have made. I will have to hear the preliminary testimony before I can decide as to the admissibility of any statement made by the defendant. I overrule the objection at present.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

Examination by Mr. TODD:

Q. Captain, now in answering my questions be sure and not state anything that was said. These are merely preliminary questions, and I want you to state the circumstances of the different occasions. State whether or not at any time the defendant Holt made statements to you or in your presence.

Mr. RIDDELL. We object to that.

The COURT. Objection overruled.

Mr. CALDWELL. We object to this on the ground that no preliminary foundation has been laid showing whether any statements were made. It should first be shown what circumstances were surrounding his arrest and detention. Will your honor rule upon that?

The COURT. Yes, sir; I overrule the objection.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

Q. State the first time, giving the day and date and the place.

A. The first conversation I had?

Q. The first statement that the defendant made.

A. On Saturday afternoon.

Q. Where?

80 A. In the hospital office.

Q. Who were present?

A. Captain Abbott, Dr. Porter, and Dr. — some of the time, Dr. Harris; some of the time, Captain Reeder and Lieutenant Burt.

Q. State the next time you heard the defendant make any statement.

A. On Monday following.

Q. Where?

A. In the same place.

Q. Who was present?

A. At first there was Dr. Harris, Dr. Porter, Captain Abbott, Lieutenant Burt, and myself. Subsequent to that, when we were in the office together by ourselves.

Q. Who?

A. Private Holt and myself.

Q. At whose request?

A. At his.

Q. What did he request?

A. He simply asked——

Mr. CALDWELL. We object to any statements that were alleged to have been made by the defendant. Captain Newton was just about to say what the defendant stated to him.

Q. What did he request?

Mr. CALDWELL. He can't say that without saying what he said, and we object to any statement what the defendant said.

The COURT. I will sustain that objection for the present.

Q. How did you happen to be alone with him, if you can tell without giving what he said?

Mr. TODD. Does the court permit that question? I don't want to transgress the rules of the court; I want to show the circumstances though.

81 The COURT. I think you are getting on dangerous ground. Something more should be shown before you come to that. Let me ask a few questions.

Examination by the COURT:

Q. Captain, before anything was said by the defendant, or any request made by him at all, had there been anything said to him to affect him in any way to induce him to talk?

A. He had been undergoing an examination by me, as well as the other members of the board.

Q. By "examination" you mean interrogating him?

A. Yes, sir.

Q. Had his person been searched?

A. Not by any of us, sir. It might have been at the guardhouse, but I don't know.

Q. You had him there under an examination; that is, you were interrogating him with reference to this finding of this body?

A. Yes, sir.

Q. Before you began to interrogate him did you threaten him in any way?

A. I did not.

Q. Did you promise him anything to induce him to talk?

A. I did not.

Q. Did you inform him that he was not obliged to say anything unless he chose to do so voluntarily?

A. No, sir; there was nothing said at all.

Q. Did you not inform him if he did talk and say anything that any statement he made might be used against him?

A. No, sir.

Q. Did he make any statement, or make any request that was not in response to a question of some of the officers there asked him?

82 A. Yes, sir.

Q. Before saying what he requested, or said, explain the conditions or circumstances under which he did make any such voluntary statement.

A. It was on Monday morning; he had been brought to the hospital to have his picture taken and the imprints of his fingers. It was on the third floor. I was there when he was brought in. I was there during part of the time they were taking those finger prints. I then went down to the office below. While there he came down, or was brought down by the guard, and came into the office. Dr. Porter and Captain Abbott both were asking him certain questions, and Dr. Porter turned to me and asked me if I had anything to ask him, and I said I had nothing further at all, that I cared for no more information from him. And he got up to start for the guardhouse when he made his request.

Q. Did you understand from the request that he made, and the manner in which it was made, that it was something that he desired for his own protection or his own benefit; that this request came as the voluntary suggestion of his own mind, and not in response to something that you were trying to get out of him?

A. Judge, I don't know as I just understood that. I think I do; but I don't want to answer it until I am sure.

Q. Well, you say it was after you had announced that you didn't wish any more information from him.

A. Yes, sir.

Q. If he made a request, then, did you understand from the nature of it, and from the manner in which he made it, that it was something that was a voluntary suggestion in his own mind, and

83 not a response to any effort of yours to elicit information from him?

A. Yes, sir.

The COURT. Now, to make the record, you may ask the question you desire to ask, and let the objection be made before I will rule on it.

Mr. CALDWELL. May it please the court, may I at this time ask the witness a few questions?

The COURT. Yes, sir.

Examination by Mr. CALDWELL:

Q. Captain, Holt was in the office at the hospital how many times on Saturday, the day he was arrested?

A. He was there twice.

Q. Practically three times, wasn't he?

A. No, sir. Well, he was outside the hospital once; yes, sir; but I only remember him being in the hospital twice.

Q. At the first interview with him he was given to understand, was he not, that he was the person suspected of having committed this offense; he was given to understand that?

A. Yes, sir.

Q. He was also given to understand, was he not, that the others arrested with him were putting it onto him?

A. No, sir; not at that time. You mean when he was there first in the hospital—the first time?

Q. I will make it broader. At any time Saturday?

A. No, sir; at no time Saturday.

Q. Or Sunday?

A. I can't say that he was not led to suppose that they were to put it onto him; but he was told that the others would not—would get from under and leave it all on him if he didn't look out for himself.

Q. He was given to suppose that, either Saturday or Sunday?

84 A. Yes, sir.

Mr. CALDWELL. And this, we submit, brings it under the Bram case. But if there is any doubt in your honor's mind, I can go a little further.

Q. (Mr. TODD.) Was he given to suppose by you?

A. Only in asking questions he was, Mr. Todd. He was never told at no time that it was on him—that they would put it on him.

Q. (Mr. CALDWELL.) Mr. Knight's name was mentioned, was it not, all during the conversation, at different times?

A. Yes, sir.

Q. By mentioning his name, and the questions which you asked him, that was the manner in which he was led to believe that Knight was putting it onto him?

A. The mentioning of Knight's name was entirely as to placing the time and place of all that he did the night before and up to the time of his arrest, and also the facts that Knight was also suspected of participating in the crime.

Q. Dr. Porter was also a member of the board before which he was brought in the office of the hospital?

A. He was.

Q. And was present at all times when Holt was brought there?

A. I think he was.

Q. And you remember that Dr. Porter said this to Holt on Saturday, "You might as well tell it and clear yourself, Holt, because the others have put it onto you, or are putting it onto you?"

A. I don't think that was said Saturday, Mr. Caldwell, as I remember of.

Q. That was either Saturday night or Sunday?

A. I don't think he said "They are putting it onto him." I think he said "They will put it onto you."

Q. You made a full statement of the facts and circumstances

85 of this matter to me on October 28th, didn't you, Captain, at your house at the fort?

A. I think I stated the facts to you as I understood them.

Q. And Mr. Williams, the stenographer, was there with me and took down your statement?

A. Yes, sir.

Q. Now, at that time—I am not doing this in any way to impeach you, but to give you to understand what you told me over there—you remember making this statement to me there at that time, Captan: "No; the only thing I remember, Caldwell, was the language that Porter said. He said, 'You might just as well tell it and clear yourself, Holt, because, he says, the others have put it onto you' or 'are going to put it onto you;' but I think he said 'have,' or, 'put it onto you?'"

A. Not "clear yourself;" he didn't say "clear yourself."

Q. Will you say that you didn't tell me that then, Captain?

A. I don't remember saying any such thing as "clear yourself" at any time; but I do remember telling you what I thought Dr. Porter said.

Q. Would you be willing to swear that you didn't use those words at that time, the word "clear," just as I have read it: "You might just as well tell it and clear yourself, Holt, because, he said, the others have put it onto you?"

A. I think, as I said, Mr. Caldwell, "Holt, the others will put it onto you; the others will get out of it and put it onto you," or words to that effect.

Q. Will you swear that you didn't say it at that time just as I have read it?

A. I would be almost willing to say I didn't say "clear."

Q. You would almost be willing; are you willing to swear it?

86 A. Well, I don't remember saying it. I don't think I did, either. But I didn't——

Q. Then you deny saying it, do you, Captain?

A. I do deny saying that word "clear;" yes, sir.

Q. But the rest of it is as you said it?

A. Words to that effect; yes, sir. I think I said, "The others will get out from under and leave it onto you."

Q. Do you remember Dr. Porter saying, either on Saturday or Sunday, "Now, it will be better for you to come right out and tell us all about it?"

A. Yes, sir; I think he said that.

Q. Either Saturday or Sunday, was it?

A. Yes, sir.

Q. Would you be willing to say which day it was?

A. I think it was Saturday.

Q. Were you present, Captain, on Saturday evening, when Dr. Porter pushed a pen and paper towards Holt and told him that if he had any word to send home that he better do so, as the men were going to mob him that night?

A. I was not, sir; that is, if it was said.

Q. Do you remember his saying anything substantially in those words?

A. No, sir. I remember what he did say. He said: "Holt, the men are very much incensed towards you over what you have done." I don't remember of ever hearing him say anything but that.

Q. Captain Abbott also said that, did he?

A. No, sir.

Q. Do you remember anything that Captain Abbott said to Holt?

A. Yes; I do.

Q. What was it?

87 A. He asked him about his mother and his sisters and asked him about his family. Now, he says, "Holt, if you have any regard for them, have any feeling toward them, don't you think you better tell us all about it now?" And Holt turned to him and said, "What good would it do my mother or sisters if I did state it?"

Q. What did Captain Abbott tell him?

A. He didn't say anything.

Mr. CALDWELL. You said when you started out on this that you would not say anything said by the defendant or that you claimed was said by the defendant.

WITNESS. You asked the question; I didn't think of that.

Mr. CALDWELL. We ask that that portion of the answer be stricken out.

The COURT. It will be stricken out.

Mr. CALDWELL. And that the jury be instructed to disregard it.

The COURT. The jury will understand; all these questions are to fix in my mind the question as to the admissibility and the competency of the testimony that the Government wants to offer, and it has no bearing at all on the question you have to decide.

Q. (Mr. CALDWELL.) Was there any time, Captain, when Holt was before this board of inquiry in the office of the hospital when you were not present; that is, any time that he was there with the other members of the board than yourself?

A. I don't remember when we went to dinner Saturday night whether he went out of the office ahead of me or not. Captain Abbott and I went out together, and I don't remember now as to whether he stayed with Dr. Harris and Dr. Porter in the office. I am not positive on that, but it is my impression that he did; that he remained behind me in the office.

Mr. CALDWELL. Now, may it please the court, we would like Dr. Porter and Lieutenant Burt, who were present Saturday afternoon when the defendant was over there, provided your honor is not

88 sufficiently advised in the premises.

Mr. TODD. Are you through with Captain Newton at the present time? If you are I would like to ask some questions.

Mr. CALDWELL. Does your honor care to hear any statements that were made to the defendant after he is alleged to have made this request on Monday morning?

The COURT. Subsequent to that?

Mr. CALDWELL. Yes, sir.

The COURT. No; that would not have any effect, any statement made to him subsequently.

Mr. CALDWELL. Well, it is subsequent merely to this preliminary conversation which the Captain was just talking about, after he came down from having his photograph taken, and his finger prints taken.

Mr. TODD. It is not preliminary to the request, is it?

Mr. CALDWELL. Yes, sir; yes, sir. No, there is nothing in here that Holt made any request. There is nothing in here that the defendant said anything.

The COURT. Were you through interrogating the captain?

Mr. CALDWELL. Yes, sir; unless your honor would permit us to examine these other witnesses before he goes further.

The COURT. No; I will have to decide on the right of the Government to make this inquiry of this witness by his statement which he made here. If there is any explanation, or contradiction of it, that will be a part of the defendant's case.

Mr. CALDWELL. But the point which I desire to call your honor's attention to at this time is that the defendant was in the hospital in the presence of other members of the board while Captain Newton, the witness on the stand, was not present, and that statements were made to him at that time, of which Captain Newton has disclaimed any knowledge, which were along the line of this already
89 brought out. And they even go further. That was while he was in the presence of other members of the board, but not this witness.

The COURT. No, we will not interrupt the examination of the witness on that point, to call other witnesses as to other matters.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

The COURT. Now, propound your questions in the proper way, Mr. Todd, and before it is answered I will hear a formal objection to it.

Examination by Mr. TODD:

Q. State, Captain Newton, what the request was which the defendant made?

Mr. CALDWELL. We object to the question on the ground that any statements which this defendant may have made, were made under such circumstances as violate the fifth amendment to the Constitution of the United States, which provides that he cannot be compelled to be a witness against himself. Any statements which he may have made were not voluntary, as is already shown by the statements which the captain has made.

The COURT. I will sustain the objection.

Mr. TODD. If the court please, let me ask a question of the captain then, prior to that request, prior to the question I did ask, preliminary to it.

The COURT. Go ahead.

Q. Do you know, Captain, what effect any remarks that you have testified Dr. Porter made, had upon the defendant?

Mr. CALDWELL. We object to that on the ground that it is impossible for any third person to tell what effect any statement would have upon the mind of another person.

The COURT. That objection is sustained.

Mr. TODD. If the defendant said those remarks had no effect
90 upon him, it would certainly be good evidence that they didn't.

The COURT. In the Bram case the Supreme Court says it is impossible to tell the effect on the human mind of conditions of a man under arrest and accused of crime.

Mr. TODD. In the Bram case the defendant was stripped, and in a foreign country, and he was compelled to answer questions. That is what the Supreme Court said the effect of it was, of asking him questions when he was in that position; that it was the effect of coercion. In the case at bar the defendant made the request, and was with the captain alone, and made statements to him alone, freely and voluntarily.

Mr. CALDWELL. We except to the language of counsel as not being based upon a fact, as shown by the foundation already laid.

Mr. TODD. The Bram case is the only case in the Supreme Court of the United States where a confession was barred that I have been able to find.

The COURT. But it is a distinct declaration of that court, sufficient ground to reverse a conviction by a jury, because the court admitted something that was said which was not a confession, but was something that was used to his prejudice.

Mr. TODD. That was in answer to questions that were asked him. In this case the defendant asked the questions; he asked those questions voluntarily.

Mr. RIDDELL. We object.

The COURT. The ground that the court excludes this question on is, that there had been such a course of examination as to raise a presumption that the defendant may have been influence by it in such a way; that whatever he said was extorted from him rather than being a free and voluntary statement that he made. In the Hardy case there was a case where the defendant himself persisted, insisted,
91 and persisted in making a statement after he had been warned not to talk, and he was informed that he would have an opportunity at the right time to make any statement that he wanted to.

Mr. TODD. That was that Alaska case, I believe.

The COURT. Yes.

Mr. TODD. That is a case since the Bram case. But in this case I asked the last question for the purpose of showing that none of that did have any influence, and that was not the reason which induced him to make the statements.

The COURT. I sustain the objection. The practice in this court has been to adhere to the rule announced in the Wilson case; that the circumstances and conditions were to be proved, and then it was for

the jury to judge of the weight and value of any statement that was made. But in the Bram case the Supreme Court take the ground distinctly that it is reversible error to allow statements to be introduced which were made by the accused person after he was under arrest, and with officers that had custody of him, and were examining him and interrogating him for the purpose of forcing some statement from him that would give light on the case. In that case the Supreme Court said that it is impossible to determine the effect on the human mind of a person being placed in that situation, and it is considered that under those conditions anything that he might have said was in the nature of an involuntary statement, and put him on the defensive.

Mr. TODD. Will the court permit me to say something further?

The COURT. Mr. Todd, I am willing to hear you.

Mr. TODD. In the Bram case the parties were putting interrogatories to him. In this case I propose to show it was not in answer to interrogatories, but what the defendant voluntarily said himself upon his own request. I will further show that he was wholly uninfluenced by anything that Dr. Porter or anybody else said to
92 him. It is a case entirely different from the Bram case. The defendant was asked questions, and it was the answer to the questions, whichever way he answered, as I read the language of the Supreme Court, must be construed to be an admission against him. The question was with him stripped, alone in a foreign country, in possession of a police officer, and it amounted to coercion.

The COURT. One of the dangers in the Bram case was not in answering a question, but was the question that Bram himself asked the officer.

Mr. TODD. It was brought out by an interrogatory.

The COURT. That the man was under the force of pressure and that he made an explanation.

Mr. TODD. He asked where he was, as I remember it. That is the one which you have reference to, where the man who say it was.

The COURT. Yes, sir.

The COURT. I feel obliged by the decision in the Bram case to exclude everything that may have been said, or suggested, by the defendant during the time that he was under the influence of the searching examination that was made of him.

Q. Captain, after Holt's arrest, did you ever see him have this blouse on?

A. I did.

Q. State how it fitted him?

Mr. CALDWELL. I object to the question.

The COURT. I overrule the objection.

Mr. CALDWELL. We object to the answer on the ground that the witness was instructed to put on the coat by a superior officer, who was an officer in the United States Army, and the witness being an enlisted man left him to exercise no discretion in the matter,
93 and rendered his action involuntary and violative of the fifth amendment to the Constitution, which we have already referred to.

The COURT. I overrule the objection.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

A. Well, the blouse fitted him as well as—about as well as those blouses fit any man. They are usually a little loose.

Mr. TODD. I would like to ask this question—Captain, you need not answer until counsel has an opportunity to object to it:

Q. Did Holt at that time make any voluntary statement in regard to this blouse?

Mr. CALDWELL. We object to it.

The COURT. Objection sustained.

Q. Was that badge there at this time?

Mr. CALDWELL. At what time?

Q. (Mr. TODD.) Saturday afternoon when the blouse was tried on.

A. Yes, sir.

Q. Was it shown to him?

A. Yes, sir.

Q. I will ask you if he made any voluntary statement in regard to that.

Mr. CALDWELL. That is objected to.

The COURT. Objection sustained.

Mr. RIDDELL. The court ruled on this several times, and the prosecutor is trying to get before the jury the fact that he was asked something.

The COURT. There is no use to make a speech; I have ruled.

Mr. RIDDELL. I have objected.

Mr. TODD. If the court please, I have tried this case fairly, I think, and I am not entitled to those remarks.

The COURT. I don't think so.

94 Mr. TODD. You may take the witness.

The COURT. I don't think there is any occasion for counsel on either side lecturing or scolding his adversary.

Mr. CALDWELL. At this time we desire to ask, without in any manner reflecting upon the jury, that the jury be discharged, on the ground that statements have been made in their presence which were not proper evidence and which were calculated to prejudice them against the defendant, and were highly improper.

The COURT. The motion is denied.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

Mr. TODD. The Government rests.

Mr. CALDWELL. We ask at this time that the cases of 1682 and 1683, the case indicting Holt separately and the case indicting Holt and Knight jointly, be consolidated under a provision of the Revised Statute, section 1024, of the United States Revised Statutes. (Section read to the court.)

Mr. TODD. I object to this. This is not the proper time to consolidate the action after the Government has rested.

The COURT. I sustain the objection.

Mr. CALDWELL. We ask an exception.

Mr. CALDWELL. I would like to offer in evidence a certified copy of the indictment in case No. 1683 in the United States Circuit Court for the Western District of Washington, Northern Division, entitled "United States of America, plaintiff, vs. James H. Holt and Thomas H. Knight, defendants."

Mr. TODD. I object to that as incompetent, immaterial, irrelevant.

The COURT. I sustain the objection.

Mr. CALDWELL. We ask an exception.

The COURT. Exception allowed.

95 And thereupon the court instructed the jury as follows:

The COURT. Gentlemen of the jury, this case will now be submitted to this jury to decide the general question of whether the defendant is guilty or not guilty of the crime charged against him in the indictment.

It is necessary that you should understand, in the main, the nature of the charge and what are the essential elements of the crime which have to be proven to justify a conviction.

The indictment in this case charges the defendant with the crime of murder.

The statutes of the State of Washington divide murder into murder of the first degree and murder of the second degree. The laws of the United States, upon which this indictment is founded, do not make that division, but the crime charged is general, the crime of murder.

The crime of murder consists in the intentional killing of a human being without legal excuse or justifiable cause, and with deliberate intent to commit the offense, and with malice.

The intent in the mind of the accused person must be shown to commit the murder. It must be shown that he was acting voluntarily, and not under any authorization which would make it legal; not under such circumstances as would make it justifiable, as where a man is acting in defense of his own person or in defense of his family. And it must have been his deliberate act; that is, an act that was committed after the mind had deliberately formed an intent to commit the act, and with malice.

Malice is a quality or condition of the mind which prompts
96 or instigates the person to do an act which he knows to be wrong, for the mere purpose of inflicting an injury. Malice is presumed when a person voluntarily and with a deliberately formed purpose makes an assault and wounds another person with a deadly weapon without justification or legal excuse. But whatever the circumstances are, the jury are to judge from the facts proven by the evidence whether the killing was maliciously done, considering the definition of malice, as I have stated it. All of those elements must be shown by the testimony to be established in order to justify a verdict of guilty of the crime of murder.

This court is a court of the United States Government, administering only the laws of the United States, and its jurisdiction is limited

by the Constitution and laws of the United States. This court cannot try a man or punish a man for the crime of murder committed in the State of Washington unless he comes within the terms of the grant of jurisdiction and the terms of the law defining crimes punishable under the laws of the United States. Therefore, in this case, to show the jurisdiction of the court, it is charged in the indictment that this offense was committed by the defendant at Fort Worden, a place under the exclusive jurisdiction of the United States, being a military post or fort. That is one of the facts which has to be proved by the Government in the case, and must be passed upon and decided by the jury that the offense, whoever committed it, was committed within the limits of the Fort Worden military post, and that that post was at the time within the exclusive jurisdiction of the United States.

Ordinary offenses of this character are tried and determined by the courts of the respective States, and it is only when they are committed in some place or district of the country under the ex-
97 clusive jurisdiction of the United States that the jurisdiction of the federal court attaches.

The question, whether Fort Worden Military Reservation is a place, the exclusive jurisdiction of which has been ceded to the United States, and the question whether the homicide charged in this case was committed within the confines of the territory so ceded, is a question of fact for you to determine from the consideration of the evidence, and, unless the Government has proven, beyond a reasonable doubt, that the homicide was committed within the boundaries covered by, or included within the cession, then it would be your duty to acquit the defendant.

The jury are required to decide this case upon the testimony admitted upon the trial. You are to give that testimony, in its entirety and every part of it, your candid consideration, and determine from that, independently yourselves, what the facts are, and whether the facts when applied to the definition of the crime have established the defendant's guilt beyond a reasonable doubt; if so, then the verdict of the jury should be that the defendant is guilty as charged in the indictment. That verdict may be qualified, as I will hereafter explain to you, or else it should be a verdict of "not guilty." That is, if the crime has not been established by the evidence sufficient to convince the jury beyond a reasonable doubt, the defendant should have a verdict of "not guilty."

The Government, by the defendant's plea of "not guilty," is placed under the obligation of overcoming the legal presumption of innocence by clear and convincing evidence, sufficient to convince the jury beyond a reasonable doubt, in order to justify a verdict of guilty.

Now, in this case there has been no direct testimony connecting the defendant with the crime, and by "direct testimony" I mean testi-
mony of living witnesses who saw him commit the act.
98 No such testimony has been introduced.

The Government has produced evidence tending to prove that the crime was committed, and to connect the defendant with the commission of that crime by what is termed "circumstantial evidence," which requires the jury to give weight and consideration to it, and determine what circumstances have been proved, and, consequently, whether those circumstances which have been proved, constitute convincing evidence of the defendant's guilt.

The court instructs the jury that before they can convict the defendant in this case it must appear from the evidence, beyond a reasonable doubt, that the defendant, and not somebody else, committed the offense charged in the indictment. It is not sufficient that the evidence shows that either the defendant, or somebody else committed the crime, nor that the probabilities are that the defendant, and not somebody else committed the crime, unless those probabilities are so strong as to remove all reasonable doubt as to whether the defendant is the guilty party.

You are instructed further that circumstantial evidence is legal and competent in criminal cases, and if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is entitled to the same weight as direct testimony. You are instructed that what is meant by circumstantial evidence in criminal cases is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged; you are instructed as a matter of law that where a conviction for a criminal offense is sought upon circumstantial evidence alone, the Government must not only show beyond a reasonable doubt that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible with any reasonable hypothesis consistent with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the
99 accused and that to authorize a conviction on circumstantial evidence the circumstances should not only be consistent with defendant's guilt, but they must be inconsistent with any other reasonable conclusion, and such as to leave no reasonable doubt in the minds of the jury of defendant's guilt. If there is any one single fact proved to the satisfaction of the jury by preponderance of the evidence which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant.

In addition to what I have read to you, circumstantial evidence, to justify a conviction, would be such a complete chain of circumstances consistent with each other as to establish the conclusion in the mind of the jury that they do of themselves constitute convincing evidence.

You will apply both rules that I have read. First, that the circumstances must be consistent with the theory of the defendant's guilt, and inconsistent with any reasonable theory that he is not guilty.

The law presumes innocence in all criminal prosecutions. We begin with a legal presumption that the defendant, although accused, is an

innocent man. Not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted; that the evidence must overcome the legal presumption of innocence. And in order to overcome that legal presumption, as I have already stated, the evidence must be clear and convincing and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty. That is, there must be such positive and consistent testimony throughout to establish the fact that the defendant is guilty as charged as will leave the jury satisfied and convinced after
100 they have had given the testimony a candid consideration. It has to be more than a mere preponderance of the evidence. It has to be evidence that goes further than to establish the probability that the defendant is guilty. It has to prove positively that he is guilty.

Now, the term "reasonable doubt" is to be understood by the jury as being an actual substantial doubt left in your minds that you are conscious of after having given the testimony consideration, and such a doubt as a reasonable person might entertain, and such a doubt as a reasonable person, acting honestly and candidly, would be influenced by where he is acting in a matter of great importance in his personal affairs. Do not misunderstand the phrase "reasonable doubt" as being the same thing or synonymous with any kind of a doubt, or that the phrase or the principle means that the Government is placed in the situation of having to do an impossible thing, of establishing the guilt of an accused person to an absolute moral certainty. As I have said, the term "reasonable doubt" is to be understood in the ordinary meaning and acceptation of those two words coupled together, qualifying each other.

If after giving this case a full and candid consideration you feel that you are fully convinced that the Government has made out its case and proved that the defendant is guilty, and when you have deliberated on it and feel that you have left no substantial doubt in your minds, or not such a doubt as would influence a reasonable person acting with honesty and with a firm purpose to do right, then your verdict should be that the defendant is guilty as charged in the indictment. But if, on the other hand, although the evidence preponderates against him and raises a probability that he is guilty, if you feel in your minds that you have a substantial reasonable
101 doubt, it is your duty to give the defendant the benefit of that doubt and return here a verdict of not guilty.

(The foregoing are instructions which were given by the court to the jury herein, and are the only instructions given by the court to said jury on the law relating to reasonable doubt, presumption of innocence, circumstantial evidence, and the jurisdiction of the United States over the place where the offence charged is alleged to have been committed, excepting only the instruction hereinafter set out, which was given by the court to the jury on December 22, 1908.)

In open court, and before the jury retired to deliberate, the following exceptions were reserved to the instructions of the court and to the failure or refusal of the court to give instructions which the defendant had, before argument to the jury by respective counsel, filed in writing and requested the court to deliver to the jury:

Mr. CALDWELL. Defendant excepts to the failure of the court to give the instruction on the presumption of innocence as requested by the defendant, which request is as follows:

"The prosecution must prove beyond a reasonable doubt every material allegation of the indictment as therein charged. Nothing is to be presumed or taken by implication against the defend-
102 ant. He is presumed to be innocent until his guilt is established beyond a reasonable doubt by competent and sufficient evidence. The presumption of innocence starts with the charge at the beginning of the trial, and goes with him until the determination of the case. This presumption of innocence is evidence in the defendant's favor, and should be so considered and weighed by you in determining the verdict you render in this case. To the presumption that the defendant is innocent you should add all the evidence in his favor and weigh this with the evidence against him, and then, unless you shall find the defendant guilty beyond all reasonable doubt, you will acquit him."

And we further except to the failure of the court to instruct the jury that "the presumption of innocence is evidence in the defendant's favor, and should be so considered and weighed by you in determining the verdict you render in this case."

Defendant excepts to the failure or refusal of the court to give the instructions on reasonable doubt, as requested by the defendant, which instruction reads as follows:

"A reasonable doubt, as the term is employed in the administration of criminal law, is an honest, substantial misgiving, generated by the evidence, or want of it. It is such a state of the evidence as fails to convince your judgment and conscience and satisfy your reason of the guilt of the accused. If the whole evidence, when carefully examined, weighed, compared, and considered, produces in your minds a settled conviction or belief of the defendant's guilt, such an abiding conviction as you would be willing to act upon in the most weighty and important affairs of your own life, you may be said to be free from any reasonable doubt, and should find a verdict in
103 accordance with that conviction or belief. If there is any one single fact proved to the satisfaction of the jury by preponderance of the evidence which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant."

Defendant excepts to the instruction of the court that the presumption of innocence is not an absolute rule, but a principle, because such is not the law.

Defendant excepts to the instruction given by the court to the jury on the question of reasonable doubt and to the language, "That rule

does not require the Government to do an impossible thing to establish the guilt of the defendant to an absolute moral certainty," because such is not the law.

The COURT. I will allow the exceptions.

(Each and all of the exhibits in the case, including plaintiff's Exhibit B, were taken to the jury room when the jury retired, and there remained until the verdict was rendered.)

104 On this 22nd day of December, 1908, the defendant, in person, and his counsel, being present in court, the jury were conducted into court, their names were called, and, all being present, the following proceedings took place:

The court inquired of the jury if they desired further instructions; thereupon the foreman answered as follows: "There is a doubt in the minds of some of the jurymen; are we at liberty to ask a question?"

The COURT. "Yes; you may indicate to me any matter concerning which you desire instructions from the court."

A JUROR. "The question in doubt was, What constitutes a reasonable doubt, as stated in your charge to the jury?"

The COURT. "A reasonable doubt is an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit. In the explanation of the rule which I gave in the general instructions to this jury I endeavored to refute the theory which sometimes prevails with jurors in criminal cases that any mere possibility may constitute sufficient ground for a reasonable doubt upon which the decision of a case may be based. The law does not contemplate bare possibilities, but does regard actual things. Jurymen should not be controlled by any fantastic theory, but in the performance of jury service you should decide controversies as you would any important question in your own business affairs."

105 The COURT. "Is there any other matter concerning which you wish to make inquiry?"

The FOREMAN. "Would it be proper for us to have or see portions of the evidence?"

The COURT. "No; the jury must depend upon their recollection of the evidence; if you were allowed to see the evidence it might lead to error by reason of undue importance being given to fragments. You should consider the evidence as a whole, according to your best recollection of it."

And thereupon the defendant, by his attorney, Mr. Caldwell, excepted to the additional instructions of the court upon the subject of a reasonable doubt, and the court allowed his exception.

Thereupon the defendant, by his attorney, Mr. Riddell, requested the court as follows: "Inasmuch as this is a case of circumstantial evidence, we ask your honor to instruct the jury at this time that if they shall find one fact established by a preponderance of the evidence which is inconsistent with the guilt of the defendant, that will be sufficient to raise a reasonable doubt and they should acquit him."

The court refused to give said additional instruction, and to the ruling of the court in denying said request the defendant, by his attorney, Mr. Riddell, then and there took exception, and his exception was allowed by the court; all in the presence of the jury.

The foregoing additional instructions to the jury, set forth in full, were the only instructions given them by the court after they first retired on December 21, 1908, to consider their verdict.

106 On December 22, 1908, the jury returned a verdict finding the defendant guilty as charged, without capital punishment. Thereupon during the same term of court, and before sentence, defendant filed his motions in arrest of judgment and for a new trial, said respective motions being in the following words:

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. } No. 1682.

*Motion in arrest of judgment.*

And now comes the defendant and moves the court to arrest judgment on the indictment herein upon which the defendant was convicted, because:

1. The facts stated in the indictment herein do not constitute an offence against the laws and statutes of the United States.
2. The court erred in overruling the demurrer of defendant to said indictment.
3. The indictment herein was founded on incompetent evidence, as appears from defendant's motion to quash the indictment and plea in abatement filed herein.
4. The court erred in overruling defendant's said motion to quash the indictment herein and plea in abatement.

CALDWELL & RIDDELL,
*Attorneys for Defendant.*

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

107 UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. } No. 1682.

*Motion for new trial.*

The defendant moves that the verdict herein rendered be vacated and a new trial awarded for the following reasons:

First. Irregularities in the proceedings of the court, jury, and United States attorney, various orders of the court and abuses of discretion by the court, by each of which the defendant was prevented from having a fair trial.

Second. Misconduct of the jury.

Third. Insufficiency of the evidence to sustain the verdict, in the following particulars: As to the jurisdiction of the United States over Fort Worden Military Reservation. Captain M. C. Buckey could not identify the boundaries of said Fort Worden as coincident with the boundaries of the places described in the various deeds and decrees attempted to be offered in evidence, nor with the boundaries of any other place. The book marked "Plaintiff's Exhibit B" was not offered in evidence for the consideration of the jury, nor was it so received in evidence.

Fourth. Misconduct of the United States attorney, as follows:

(a) In saying to the jury in his opening statement that defendant has confessed the crime for which he was then on trial.

(b) In repeating that statement in the presence of the jury in his argument over the admissibility of the statements alleged to have been made by defendant to Captain Harry W. Newton.

(c) In arguing with the court that said alleged statements were voluntary and admissible after the court had held them inadmissible, all in the presence of the jury.

Fifth. Errors in law occurring at the trial, as follows:

108 (a) Permitting the prosecutor to ask the jurors on their voir dire whether they had any scruples against capital punishment.

(b) Allowance of challenges to jurors for cause on the ground that they had conscientious scruples against capital punishment.

(c) Refusal of challenges for cause by defendant to jurors who had formed an opinion as to defendant's guilt or innocence which it would require evidence to remove.

(d) Admission of testimony of Captain M. C. Buckey to show jurisdiction of the United States over said Fort Worden.

(e) Admission of testimony of Captain M. C. Buckey, reading from the book marked "Plaintiff's Exhibit B."

(f) Receiving in evidence for the consideration of the court the book marked "Plaintiff's Exhibit B."

(g) Permitting book marked "Plaintiff's Exhibit B" to go to the jury room and remain in the custody of the jury while they were deliberating on their verdict.

(h) Admission of testimony of witnesses Reeder, Porter, and Newton that defendant by order of his superior officers in the United States Army put on the blouse marked "Plaintiff's Exhibit S," and that said blouse fit the defendant.

(i) Refusal of the court to consolidate the indictments in this case and in case #1683 in this court, United States vs. James H. Holt and Thomas H. Knight, both of which were for the same alleged offence,

or to admit in evidence a certified copy of said indictment in cause #1683.

(j) Refusal of the court to permit cross-examination of witness Edward Shafer, alias George E. Noll, to show that no unfair advantage was taken of him in taking his statement, before the trial, about his knowledge of the facts at issue in this case.

(k) Refusal of the court to permit cross-examination of said
109 witness Shafer, alias Noll, as to statements made by him on his enlistment, August 25, 1905.

(l) Refusal of the court to give in full the instruction requested by defendant entitled "Instruction on evidence that the crime was committed by another person than the accused."

(m) Refusal of the court to give the instruction on the presumption of innocence, as requested by defendant.

(n) Refusal of the court to instruct the jury that the presumption of innocence is evidence in the defendant's favor, as requested by defendant.

(o) Refusal of the court to give the instruction on reasonable doubt, as requested by the defendant.

(p) The instruction by the court that: "We begin with a legal presumption that the defendant, although accused, is an innocent man. Not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted."

(q) The instruction by the court on the question of reasonable doubt, and the language that the jury must not understand "that the phrase or the principle (reasonable doubt) means that the Government is placed in the situation of having to do an impossible thing, of establishing the guilt of accused person to an absolute moral certainty."

(r) The instruction of the court on reasonable doubt given to the jury upon their return to the court room and request for instruction on what constitutes a reasonable doubt.

(s) Refusal of the court to add in his instruction on reasonable doubt, upon the occasion of the return of the jury and their request for instruction on that point, that if the jury found one fact inconsistent with defendant's guilt that would be sufficient to raise a reasonable doubt, as requested by defendant.

This application for a new trial is based on the affidavit
110 of Hugh M. Caldwell and on the motion filed herewith, on the record, pleadings, motions, and orders filed herein and on the minutes of the court.

CALDWELL & RIDDELL,
*Attorneys for the Defendant.*

In the argument of the motion for a new trial defendant urged the following errors which the rules of court do not require to be specifically set forth in said motion:

(1) That the court refused to exclude the jury from the court room during the argument of the motion to quash the indictment and plea in abatement.

(2) That the court refused to exclude the jury from the court room during the preliminary examination of witnesses and argument over the inadmissibility in evidence of alleged statements by defendant.

(3) That the court permitted the jury to separate after they had been sworn.

At the time defendant filed his motion for a new trial he filed in support thereof the following motion for examination of jurors:

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. } No. 1682.

*Motion.*

Comes now the defendant herein, by his attorneys, Caldwell & Riddell, and in support of his motion for a new trial, filed herewith, moves this honorable court as follows:

I.

That jurors James Doran, William Henry Pumphrey, and
111 George W. Douglas, now in attendance upon this court, and who sat as jurors in the trial of the above-entitled case, be called before this court and be required to answer under oath concerning the allegations set forth in the affidavit of Hugh M. Caldwell, dated January 7, 1909, and filed herewith, that it may be determined by this court whether the statements related by said jurors to the affiant therein are in fact true, and whether said facts constitute grounds for a new trial.

CALDWELL & RIDDELL,
*Attorneys for Defendant.*

In support of said motions for new trial and for examination of jurors, defendant at the same time filed the following affidavit of Hugh M. Caldwell:

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. } No. 1682.

*Affidavit of Hugh M. Caldwell.*

STATE OF WASHINGTON,
*County of King, ss:*

Hugh M. Caldwell, being duly sworn, on oath deposes and says: That he was at all times hereinafter mentioned and now is one of the attorneys for the defendant, James H. Holt;

That a jury was sworn on December 11, 1908, to try the defendant upon the indictment herein; that said jury so sworn did thereafter hear the evidence and render the verdict herein on the 22nd day of December, 1908, as shown by the record;

112 That on the afternoon of Friday, December 11th, 1908, the court adjourned until Tuesday, December 15th, 1908, at 10 o'clock in the morning, and on the afternoon of Friday, December 18th, 1908, after the evidence of both prosecution and defense was all in, the court adjourned until ten o'clock in the morning of Monday, December 21st, 1908, for argument by respective counsel and instruction by the court; that from the time said jury was sworn to try said case until they retired to consider their verdict, each and every one of the members of said jury was permitted to separate from the other members thereof;

That on the 5th day of January, 1909, in the corridor of the building in which this court is held, affiant was informed by James Doran, one of said jurors, that he, the said Doran, being then and there a juror sworn to try this case, repaired to his home in Skagit County, State of Washington, and while there between the dates of adjournment last aforesaid, and while the trial of this case was still pending, engaged in conversation with one of his hired men on his, the said Doran's farm, and that during said conversation the trial of this case was referred to and discussed to some extent by the said hired man and the said juror, Doran;

That there was no restraint whatever placed upon any of said jurors by the court as to where they should or should not go during said trial, and no restraint whatever was placed upon any of said jurors as to whether they should or should not read the daily newspaper accounts of this trial while the same was pending and before the verdict herein was rendered;

That on December 11th, 1908, and on dates subsequent thereto while this case was being tried in the city of Seattle, King County, Washington, there appeared in the daily newspapers in said city of Seattle, abbreviated and more or less incomplete accounts of the proceedings in the trial of this case, together with comments

113 thereon; that the Seattle Daily Times, a daily newspaper published in said city of Seattle, in its issue of Wednesday evening, December 16th, 1908, contained the following article, beginning in the sixth column, on the first page of said paper under a likeness of the defendant, printed about six by eight inches in size:

"J. H. Holt, on trial in U. S. Court for murder.—Holt associated with improper companions.—Testimony shows that defendant in murder trial spent hours with dissolute persons at Port Townsend.—Witnesses swear he bought much liquor.

"If Harvey Holt, charged with the murder of Corporal Henry E. Johnson, whose body was robbed and found in a furnace at Fort Worden Barracks, at Port Townsend, May 9th last, is found guilty by a jury of twelve men selected to try him, he can lay the blame for

his condition on the evil influence of dissolute companions and the craving for money to continue his habits.

"Testimony brought out at the trial this morning before Judge C. H. Hanford in the United States court, the authenticity of which was corroborated in each instance by the long string of witnesses, who took the stand in rotation, showed that on the night the murder of Johnson was supposed to have been committed Holt drained the cup of dissoluteness to the dregs. Upon an undesirable class at Port Townsend he lavished money, according to the testimony of the witnesses, who said he rarely if ever before was possessed of such an amount. With six or seven equally hilarious companions he spent many hours in dissipation.

"Ada Russell and Blanche Smith testified that on the night of the murder Holt was in their houses with his companions and
114 bought bottled beer. William Gillette, a soldier, testified that, on that night, with Holt and several other soldiers visited these houses until early in the morning. W. H. Merrick, proprietor of the reception bar at Port Townsend, testified that Holt went to his place, paid a bill which he owed, and bought a round of drinks for several persons in the saloon, then departed. G. W. Wycoff, whom the attorneys for the defense endeavored to prove a

(Continued on page two.)

"Holt associated with improper companions.

(Continued from page one.)

professional gambler but who said he was a clerk, testified that on May 8, Holt went into a saloon with several companions and bought drinks. Selmer Andeeson, a soldier, swore that Holt, with several companions, was in a bowling alley and lost $8 betting on the result of four games of bowling.

"The crime was supposed to have been committed between 5.30 and 6.30 o'clock on the night of May 8. Charles Colman, a member of the band, testified that at 7 o'clock that evening, while he was in the bathroom, Holt was in one of the other smaller rooms taking a bath. The next time he saw Holt, Colman testified, was at 8 o'clock, in the canteen, buying cigars for the crowd. Colman said he saw Holt later in the evening drinking in the Mint saloon. The next morning, according to Colman, he saw Holt going about among some of the soldiers asking for a civilian's hat. Carl Craig, a private, testified that when he went to the basement with some oil he saw a bucket containing bloody water deposited near the furnace in which the body of Johnson was found.

"A statement was read to the jury this morning from Cook Edward Shaffer—testimony before a board of examiners at the barracks a few days after the murder. Shaffer made statements to the
115 effect that Holt was the guilty person. The trial will be resumed at 10 o'clock to-morrow morning."

That said newspaper, in its issue of Thursday evening, December 17, 1908, published the following article in the second column on the seventh page, to-wit:

"Net of evidence woven about Holt.

"After weaving a net of incriminating evidence about James H. Holt, charged with the murder of Henry E. Johnson at Fort Worden barracks May 8 last, and now on trial in the United States court, the Government called its last witness this morning and rested its case.

"Government witnesses this morning told of seeing Holt in company with Grieble and Knight, two other soldiers, in a saloon on the morning after the murder. They told of the arrest of Knight and Grieble and how Holt, when Knight was arrested, ran out of the rear door of the Prescott saloon and was later caught after a long search. He was hiding under the wharf near the saloon.

"E. Harris, a physician at the fort, testified that when Holt was brought before him on the morning of the arrest, subsequent to the murder, he noticed that the defendant had soot on his hair and that the index finger on his right hand was bound with a piece of dirty cloth; also that he had on tan shoes, contrary to military regulations, which he examined closely and on which he found blood stains.

"'Clots of blood were sticking in the eyelets,' said Dr. Harris, 'and I noticed that on the upper part of the shoes there were stains which were slightly blurred as if an endeavor had been made to an obliterate them by washing. I made an analysis of these together with
116 blood stains which I found on the coat and found crystals which agreed in all respects to blood which I have examined. I found soot on the elbows of an olive drab coat which belonged to Holt.' By this testimony the prosecution hoped to show to the jury that the blood on the shoes and on the coat was that of Johnson, the musician, and that the soot got on the coat when the body of Johnson was lifted into the furnace where it was found. Dr. Harris testified that after the examination he led Holt to a room where the body of the murdered musician was, and when Dr. Harris raised the head of the soldier Holt seemed horrified and would not look at it.

"Sheriff James McCumber and Deputy McGinnis told of the capture of Holt. They said that when they were taking him to jail he asked if he was arrested for murder. This testimony was offered to show that Holt knew of the murder of Johnson before it was generally known to the public.

"The exact line of defense has not been announced."

That the Seattle Post-Intelligencer, a daily newspaper published in said city of Seattle, in its issue on the morning of Friday, December 18th, 1908, published the following article in the second column of the fifth page:

"Holt's confession is ruled out.—Government finishes evidence in the Fort Worden murder trial.—Accused man is cool.—Witnesses give circumstantial testimony of grewsome tragedy.

"The Government yesterday afternoon in the United States district court rested its case in the trial of James H. Holt, the soldier accused of killing Musician Henry E. Johnson at Fort Worden, May 8. Counsel for the defense had scored in one instance, when Judge Hanford refused the admission of an alleged confession made by Private Holt to Capt. Henry Newton, of the 126th Coast Artillery.

117 "After asking the discharge of the jury, on the grounds that improper statements had been made before it in the legal discussion over the alleged confession, counsel for the defense indicated their course of action by examination of witnesses to show that Private Knight was implicated in the murder. The defense asked that the indictment against Holt charging him jointly with Knight and the indictment charging him singly with the murder of Johnson be consolidated. The request was refused, on the grounds that it was not made at the proper time.

"Thumb prints examined.

"Dr. R. S. Porter was called by the defense to tell of his visit to Private Knight, directly after the murder, at the King County jail, and finding shreds of burnt cloth under Knight's finger nails. Dr. Porter took finger prints of Knight's hands, and said the prisoner welcomed the operation, declaring it would clear him of suspicion.

"In cross-examination Dr. Porter identified a piece of the mess table from the tailor shop, where the body was found, which bore a portion of the print of a human thumb made in blood. He admitted he had not made an exhaustive study of thumb prints. The contention of the prosecution will be that this thumb print, so far as known, the only one found about the room where the crime was committed, is valueless as evidence, since it does not show the lines of the lower part of the ball of the thumb, where the convergence of the lines is peculiar to the individual.

"The defense also called First Lieut. Charles C. Burt to testify as to how Holt acted when shown the remains of the body of Johnson.

118 "Show bloody shoes.

"Witnesses for the prosecution told of the arrest of Holt and his attempt to escape from the officer when taken with Griebel and Knight at a saloon in Port Townsend. Holt was caught hiding under a wharf. Dr. J. R. Harris told of examining Holt after the murder, of finding soot in his hair and on his coat, and finding small clots of human blood in the eyelets of his shoes. The shoes, which are in evidence, are of tan leather, and the defendant was wearing them that morning, the doctor testified, contrary to regulations. The

defendant showed considerable interest in the shoes, examining them coolly with his attorneys, and standing by as they were handed to the jury.

"Dr. Harris said he found soot marks on the elbows of an olive drab coat worn by Holt. The coat has been introduced as evidence. Against this the defense made the point that the witness did not know whether this soot was peculiar to the furnace or might have come from some other source.

"When Capt. Harry Newton was on the stand the defense opposed the introduction of even a mention of the alleged confession Holt was declared to have voluntarily made to Capt. Newton after examination by a board of inquiry at the post hospital.

"Court bars confession.

"The court decided, after a recess, that the evidence could not be admitted, following the precedent set by the United States Supreme Court in the Bram case. Judge Hanford himself interrogated the witness as to the circumstances under which Holt made his alleged confession to Capt. Newton, asking him if the prisoner was searched, if he was told he did not have to answer questions, and if he was informed that anything he said would be used against him. He
119 held that while Holt apparently made a voluntary statement, the circumstances of the examination prior to his conversation alone with Capt. Newton were such as to indicate he was under duress.

"Capt. Newton told of examining the blood-spattered cobbler's shop, of finding an iron bar covered with blood at one end and with human hair clinging to it. He told also of finding the eyelets of a military blouse in the ashes of the furnace and a gunner's badge with Holt's name on it among the débris removed from the fire."

That said newspaper, the Seattle Post-Intelligencer, published the following articles in its issue of Sunday morning, December 20th, 1908, in the second column on the third page of the second section of said issue, to wit:

"Holt to talk in his own behalf—Accused man to take stand in federal court on Monday—Knight case follows—Cross-examination expected to develop important evidence—Story of crime.

"James H. Holt, on trial in the federal court on the charge of murdering Henry E. Johnson, a musician, at Fort Worden, May 8, for the purpose of robbery, will take the stand in his own behalf Monday morning. Efforts will be made by Elmer E. Todd, United States district attorney, in cross-examination, to bring out new evidence which he believes will tend to establish Holt's guilt. The Government will put on another important witness, on his way from Chicago, before the testimony for the prosecution is closed.

"After the trial of Holt the Government will take up the case against Thomas H. Knight, the tailor, who was indicted with Holt in connection with the same case.

" United States Attorney Elmer E. Todd on Thursday offered in evidence an alleged confession claimed to have been made
120 by Holt to Captain Harry Newton, his company commander, on May 29, but it was held by Judge C. H. Hanford to be nonadmissible, and the jury was cautioned to take no cognizance of it.

" Story of the crime.

" Henry E. Johnson, a musician at Fort Worden, was murdered Mat 8 by repeated blows on the head with an iron fishplate, and the body dragged across the room and placed in the furnace. It is alleged by the State that after Johnson was killed the murderers robbed the body of $39 and went on a debauch which continued all night.

" The Government will attempt to prove that Thomas H. Knight, a tailor, who had a shop in the band quarters at the fort, was implicated. It will charge that the victim was struck from behind and that after he fell, groaning and bleeding to the floor, Holt picked up the weapon and struck the victim two blows on the head. The body was dragged into the corner, according to the allegations of the Government, a large mess table removed, and a box placed over the body, concealing it from view. After cleaning up the room hastily, Knight and Holt, it is alleged, went for a bath, returned and rifled the body and went to town and began a debauch.

" Shortly after midnight, by previous agreement, according to the charges against the accused men, they were to return to the room to dispose of the body. Knight, it is claimed, was in an advanced state of intoxication, and Holt, leaving him, got another member of the post and returned to the fort at reveille and placed the body in the furnace. They immediately left for town, where they intended to take the steamer ' Chippewa ' for Victoria, but were arrested by Sheriff Macomber.

121 " Robbery alleged as motive.

" The Government is attempting to prove that Knight was in company with Holt on the night of the murder and that Johnson and the two men were in Knight's tailor shop a few minutes before the crime was committed.

" The Government has set up the claim that robbery was the motive, as it was known that Johnson would draw his pay on the day of the murder. After retreat was sounded, it is claimed, the three men were in Knight's shop. Knight went into Johnson's room in the basement, according to the allegations of the Government, and stood in the corner back of a work bench. Holt went out where

Johnson was talking to some persons and asked him, it is alleged, to come to his room, as he had some money he wanted to pay him, but asked that he write out a receipt. As Johnson sat down to write he was struck three times on the back of the head with the fish plate. The victim fell face downward on the table, groaning with pain and practically insensible, when he was struck two more blows on the head."

That various members of the jury who tried the defendant, as aforesaid, read the daily newspapers during the progress of said trial; that Jurors George W. Douglas and William Henry Pumphrey, members of said jury, have stated to affiant since the verdict herein was rendered and filed that they and each of them read the Seattle daily newspapers during the progress of said trial, including articles concerning and commenting on this case; that affiant was unable to learn from said jurors, Douglas and Pumphrey, which articles relating to said trial were read by said jurors, or whether all of
122 said articles were read by said jurors.

That said jurors, Douglas and Pumphrey, refused for reasons unknown to affiant, to make any affidavit embodying what they had told affiant as aforesaid; that said juror, Douglas, expressed his willingness to state under oath before the court that he had read newspaper accounts of the trial, if requested so to do by the court.

HUGH M. CALDWELL.

Sworn to and subscribed before me this 7th day of January, 1909.

JOHN L. ROCKWELL,

[Notarial seal.] *Notary Public in and for the State of Washington, residing at Seattle.*

The court refused to permit the filing of counter affidavits to show whether or not the jurors mentioned in said affidavit of Hugh M. Caldwell did read said papers, but ruled on said motion on the assumption that said jurors had read the newspaper articles therein set forth. The Government filed the affidavit of James Doran, one of said jurors, which last-mentioned affidavit contained no statements controverting or denying any statements in the said affidavit of Hugh M. Caldwell, except that said Doran stated that he had not during any part of the trial of said case conversed with anyone about said case or about the issues involved therein. Said affidavits of Hugh M. Caldwell and James Doran were the only affidavits filed by the parties or considered by the court in deciding said motions.

Thereafter, on March 8th, 1909, the court overruled the
123 defendant's motions in arrest of judgment for new trial and for examination of jurors, to all of which orders overruling said motions defendant then and there excepted, which exceptions were allowed by the court.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

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| UNITED STATES OF AMERICA, PLAINTIFF AND defendant in error, *vs.* JAMES H. HOLT, DEFENDANT AND PLAINTIFF in error. | No. 1682. |

*Bill of exceptions.*

Now, on this 5th day of April, A. D. 1909, and within the term of this court during which the trial of the above entitled cause was held, came on for settlement and certification the bill of exceptions in this cause upon the proposed bill of exceptions of defendant; counsel appearing for both parties; and the United States by its attorney, Elmer E. Todd, esq., agreeing that said proposed bill of exceptions be settled and certified as a true and correct bill of exceptions in said cause; said foregoing proposed bill of exceptions is hereby settled, certified, and declared to be by me a true bill of exceptions in the above entitled cause, and made a part of the record in this cause.

C. H. HANFORD, *Judge.*

124 In the United States Circuit Court, Western District of Washington.

"*Rule 56. Objection to evidence.*

"An objection to the admissibility of evidence must state the specific ground of the objection, and must be taken before the evidence is given. But if the witness answers a question before the party has had an opportunity to object, the objection is in time if taken immediately thereupon."

UNITED STATES OF AMERICA,
*Western District of Washington,* ss:

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify that the foregoing rule is one of the rules of the Circuit Court of the United States for the Western District of Washington, adopted December 8, 1904, and that the same has ever since said time been, and now is, in full force and effect in said court.

Witness my hand and official seal this 5th day of May, 1909.

[SEAL.]

A. REEVES AYRES,
*Clerk United States Circuit Court,*
*Western District of Washington.*
By W. D. COVINGTON,
*Deputy Clerk.*

125 In the United States Circuit Court, Western District of Washington.

"*Rule 58. Exceptions to a charge.*

"Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court, after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same."

UNITED STATES OF AMERICA,
*Western District of Washington, ss:*

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify that the foregoing rule is one of the rules of the Circuit Court of the United States for the Western District of Washington, adopted December 8, 1904, and that the same has ever since said time been, and now is, in full force and effect in said court.

Witness my hand and official seal this 5th day of May, 1909.

[SEAL.]

A. REEVES AYRES,
*Clerk United States Circuit Court,*
*Western District of Washington.*
By W. D. COVINGTON,
*Deputy Clerk.*

126 In the Circuit Court of the United States for the Western District of Washington, northern division.

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| UNITED STATES OF AMERICA, PLAINTIFF and defendant in error, *vs.* JAMES H. HOLT, DEFENDANT AND plaintiff in error. | No. 1682. |

*Order to forward exhibit.*

This cause coming on to be heard upon the consent of both parties, and both parties being represented in court by their attorneys, and it appearing to the court that plaintiff's Exhibit B is a book and is difficult of reproduction, and other good and sufficient cause being shown therefor, and the court being fully advised in the premises,

It is ordered that the original of said book, marked "Plaintiff's Exhibit B," may be, and hereby is, ordered to be forwarded to the

clerk of the Supreme Court of the United States with the record on writ of error.

Done in open court this fifth day of April, A. D. 1909.

C. H. HANFORD, *Judge.*

(Endorsed:) Order to forward exhibit. Filed U. S. Circuit Court, Western District of Washington, Apr. 5, 1909. A. Reeves Ayres, clerk. R. M. Hopkins, deputy.

127 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
JAMES H. HOLT, DEFENDANT. } No. 1682.

*Assignment of errors.*

The defendant herein, in connection with his petition for writ of error, makes the following assignment of errors, which he avers exist:

First. The indictment does not state that the place where the crime is alleged to have been committed was at any time under the exclusive jurisdiction of the United States.

Second. The court erred in overruling defendant's demurrer to the indictment on the ground that said indictment does not state that the place where the crime is alleged to have been committed was at any time under the exclusive jurisdiction of the United States.

Third. The indictment does not state that the place where the crime is alleged to have been committed was, at the time when the crime is alleged to have been committed, under the exclusive jurisdiction of the United States.

Fourth. The court erred in overruling the demurrer of defendant to the indictment on the ground that said indictment does not state that the place where the crime is alleged to have been committed was, at the time when the crime is alleged to have been committed, under the exclusive jurisdiction of the United States.

Fifth. The indictment does not state that the assault therein alleged to have been made by the defendant upon the de-
128 ceased was made "feloniously and with malice aforethought."

Sixth. The court erred in overruling defendant's demurrer to the indictment on the ground that said indictment does not state that the assault therein alleged to have been made by defendant upon the deceased was made "feloniously and with malice aforethought."

Seventh. The indictment herein was found on incompetent evidence.

Eighth. The court erred and committed an abuse of discretion in overruling defendant's motion for leave to withdraw his plea of "not guilty" and interpose a plea in abatement and motion to quash the indictment on the ground that the indictment herein was found on incompetent evidence.

Ninth. The court erred in permitting the plaintiff to ask each venire man examined substantially the following question: "Have you any conscientious scruples against capital punishment?"

Tenth. The court erred in sustaining plaintiff's challenge for cause to venire men John F. Austin and John K. Miller, on the ground that they had conscientious scruples against capital punishment.

Eleventh. The court erred in refusing to sustain defendant's challenge for cause to venire man John Gilchrist, on the ground that said venire man had formed an opinion as to the guilt or innocence of defendant which it would require evidence to remove.

Twelfth. The court erred in refusing to exclude the jury from the court room during the argument on defendant's motion for leave to withdraw his plea of "not guilty" and interpose a plea in abatement and motion to quash the indictment.

Thirteenth. The court erred in refusing to exclude the jury
129 from the court room during the preliminary examination of witness E. H. Porter touching the admissibility of statements alleged to have been made by defendant and during argument of counsel on the admissibility of said alleged statements.

Fourteenth. The court erred in refusing to exclude the jury from the court room during the preliminary examination of witness Harry W. Newton touching the admissibility of statements alleged to have been made by defendant, and during argument of counsel on the admissibility of said alleged statements.

Fifteenth. The United States attorney stated to the jury in his opening statement that the defendant had confessed the crime for which he was then on trial.

Sixteenth. The court erred in refusing to instruct the jury to disregard the statement of the United States attorney, made during his opening statement to the jury, that the defendant had confessed the crime for which he was then on trial.

Seventeenth. The United States attorney stated in the presence of the jury, while arguing the admissibility of the statements alleged to have been made by the defendant, that the defendant had confessed the crime for which he was then on trial.

Eighteenth. The court erred in permitting the witness M. C. Buckey to testify from the book entitled "United States Military Reservations, National Cemeteries, and National Parks, compiled in 1904," and marked "Plaintiff's Exhibit B."

Nineteenth. The court erred in permitting plaintiff to introduce in evidence before the jury the following deeds: From Francis W. James to the United States, dated April 14, 1897; from Samuel B. Harned to the United States, dated May 6, 1897; from T. B.
130 Wilcox to the United States, dated June 5, 1897; from Louisa Stall to the United States, dated April 17, 1897; from Mary Thompson et vir et al to the United States, dated June 14, 1897; from Walter C. Smith et ux to the United States, dated June 17, 1897; from the Starrett Estate Co. to the United States, dated May 8, 1897; from Mary J. Tucker et vir, dated June 16, 1897; and from

the State of Washington to the United States, dated April 4, 1898; and the decrees in condemnation proceedings, as follows: Decree in cause #1169 in the district court of the United States for the district of Washington, entitled United States vs. Charles Isenbeis, and decree in cause #2098, in the United States district court for the district of Washington, northern division, entitled United States vs. Helen M. Freeman et al.; the same being plaintiff's Exhibits C to M, inclusive.

Twentieth. The court erred in receiving in evidence for any purpose the book entitled "United States Military Reservations, National Cemeteries, and National Parks, marked "Plaintiff's Exhibit B."

Twenty-first. The court erred in refusing to strike from the record the testimony of witness M. C. Buckey, purporting to identify the property covered by the deeds to the United States from the following persons: Francis W. James, Samuel B. Harned, T. B. Wilcox, Louisa Stall, Mary Thompson et vir et al., Walter C. Smith et ux., Starrett Estate Co., Mary J. Tucker et vir., the State of Washington, and by the decrees in causes United States vs. Charles Isenbeis and United States vs. Helen M. Freeman et al., said instruments being plaintiff's Exhibits C to M, inclusive.

Twenty-second. The court erred in permitting the witness M. C. Buckey to testify that the band barracks at Fort Worden
131 Military Reservation are located upon any part of the land described in any of plaintiff's Exhibits C to M, inclusive.

Twenty-third. The court erred in refusing to strike from the record the testimony of witness M. C. Buckey, that the band barracks aforesaid are located upon part of the land described in plaintiff's Exhibits C to M, inclusive.

Twenty-fourth. The court erred in permitting witness E. H. Porter to testify that defendant put on a blouse of a military uniform (introduced in evidence as plaintiff's Exhibit S), and that the blouse fit the defendant.

Twenty-fifth. The court erred in permitting witness R. P. Reeder to testify that defendant put on a blouse of a military uniform (introduced in evidence as plaintiff's Exhibit S), and that the blouse fit the defendant.

Twenty-sixth. The court erred in permitting witness Harry W. Newton to testify that defendant put on a blouse of a military uniform (introduced in evidence as plaintiff's Exhibit S), and that the blouse fit the defandant.

Twenty-seventh. The court erred in permitting the witness Harry W. Newton to testify in the presence of the jury that defendant made any statements while he was in the custody of the military officers immediately after his arrest.

Twenty-eighth. The United States attorney, in the presence of the jury and after the court had excluded the testimony of witness Harry W. Newton as to alleged statements made by the defendant, on the ground that they were made under duress, stated that the alleged statements made by defendant while in the custody of the

military officials were voluntary, and the prosecutor continued to argue with the court the admissibility of said alleged statements by the defendant.

132 Twenty-ninth. The court erred in permitting the United States attorney, in the presence of the jury and after the court had held inadmissible the alleged statements by defendant while in the custody of the military officials, to continue to state that said alleged statements were voluntarily made, and to continue to argue the admissibility of said alleged statements.

Thirtieth. The court erred in refusing to consolidate the indictments in cause #1682 indicting defendant separately, and in cause #1683 indicting him jointly with Thomas H. Knight.

Thirty-first. The court erred in refusing to admit in evidence the joint indictment in cause #1683 of defendant and Thomas H. Knight for the offense charged herein.

Thirty-second. The court erred in using the following language in instructing the jury that the defendant is presumed to be innocent: "Not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted; that the evidence must overcome the legal presumption of innocence."

Thirty-third. The court erred in instructing the jury: "Do not misunderstand the phrase 'reasonable doubt' as being the same thing or synonymous with any kind of a doubt, or that the phrase or principle means that the Government is placed in the situation of having to do an impossible thing, of establishing the guilt of an accused person to an absolute moral certainty."

Thirty-fourth. The court erred in refusing to give the instruction on the presumption of innocence, as requested by the defendant, in the following words: "The prosecution must prove beyond a reasonable doubt every material allegation of the indictment as therein

133 charged. Nothing is to be presumed or taken by implication against the defendant. He is presumed to be innocent until his guilt is established beyond a reasonable doubt by competent and sufficient evidence. The presumption of innocence starts with the charge at the beginning of the trial and goes with him until the determination of the case. This presumption of innocence is evidence in the defendant's favor, and should be so considered and weighed by you in determining the verdict you render in this case. To the presumption that the defendant is innocent you should add all the evidence in his favor and weigh this with the evidence against him, and then, unless you shall find the defendant guilty beyond all reasonable doubt, you will acquit him."

Thirty-fifth. The court erred in refusing to give the instruction on reasonable doubt requested by the defendant in the following words: "A reasonable doubt, as the term is employed in the administration of criminal law, is an honest, substantial misgiving, generated by the evidence, or want of it. It is such a state of the evidence as fails to convince your judgment and conscience and satisfy

your reason of the guilt of the accused. If the whole evidence, when carefully examined, weighed, compared, and considered, produces in your mind a settled conviction or belief of the defendant's guilt, such an abiding conviction as you would be willing to act upon in the most weighty and important affairs of your own life, you may be said to be free from any reasonable doubt, and should find a verdict in accordance with that conviction or belief. If there is any one single fact proved to the satisfaction of the jury by preponderance of the evidence which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant."

134 Thirty-sixth. The court erred in instructing the jury on reasonable doubt, as follows: "Now, the term 'reasonable doubt' is to be understood by the jury as being an actual, substantial doubt left in your minds that you are conscious of after having given the testimony consideration, and such a doubt as a reasonable person might entertain, and such a doubt as a reasonable person, acting honestly and candidly, would be influenced by where he is acting in a matter of great importance in his personal affairs. Do not misunderstand the phrase 'reasonable doubt' as being the same thing or synonymous with any kind of a doubt, or that the phrase or the principle means that the Government is placed in the situation of having to do an impossible thing, of establishing the guilt of an accused person to an absolute moral certainty. As I have said, the term 'reasonable doubt' is to be understood in the ordinary meaning and acceptation of those two words coupled together, qualifying each other. If after giving this case a full and candid consideration you feel that you are fully convinced that the Government has made out its case and proved that the defendant is guilty, and when you have deliberated on it and feel that you have left no substantial doubt in your minds, or not such a doubt as would influence a reasonable person acting with honesty and with a firm purpose to do right, then your verdict should be that the defendant is guilty as charged in the indictment. But if, on the other hand, although the evidence preponderates against him and raises a probability that he is guilty, if you feel in your minds that you have a substantial reasonable doubt, it is your duty to give the defendant the benefit of that doubt and return here a verdict of not guilty."

Thirty-seventh. The court erred in instructing the jury on
135 their return for additional instructions, as follows: "A reasonable doubt is an actual doubt that you are conscious of, after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit.

In the explanation of the rule which I gave in the general instructions to this jury I endeavored to refute the theory which sometimes prevails with jurors in criminal cases that any mere possibility may constitute sufficient ground for a reasonable doubt upon which the decision of a case may be based. The law does not contemplate bare possibilities, but does regard actual things. Jurymen should not be controlled by any fantastic theory, but in the performance of jury service you should decide controversies as you would any important question in your own business affairs."

Thirty-eighth. The court erred in refusing to add in his additional instruction to the jury the words requested by the defendant: "That if they shall find one fact established by a preponderance of the evidence which is inconsistent with the guilt of the defendant, that will be sufficient to raise a reasonable doubt, and they should acquit him."

Thirty-ninth. The court erred in permitting the book (plaintiff's Exhibit B) entitled "United States Military Reservations, National Cemeteries, and National Parks; Jurisdiction, Title, etc.," to be taken by the jury to the jury room and there remain while the
136 jury deliberated and found the verdict herein.

Fortieth. The court erred and committed an abuse of discretion in denying defendant's motion for an examination of jurors.

Forty-first. The court erred and committed an abuse of discretion in overruling defendant's motion for a new trial.

Forty-second. The court erred and committed an abuse of discretion in overruling defendant's motion in arrest of judgment.

Forty-third. The court erred in permitting the jury to separate and associate with whomsoever they chose, after being sworn to try the case and prior to their retiring to consider their verdict.

Forty-fourth. The court erred in permitting the jury to read the daily newspaper accounts of the trial and comments thereon during the progress of the trial.

Forty-fifth. The evidence was insufficient to sustain the verdict in that there was not sufficient evidence to show that the United States exercised exclusive jurisdiction over the place where the crime charged in the indictment herein is alleged to have been committed at the time when said offense if alleged to have been committed.

Forty-sixth. The court erred in refusing to discharge the jury at defendant's request on the ground that improper and prejudicial statements had been made in their presence during the trial.

Wherefore the defendant prays that the judgment of said Circuit Court be reversed.

CALDWELL & RIDDELL,
*Attorneys for Defendant.*

(Endorsed:) Assignment of errors. Filed U. S. Circuit Court, Western District of Washington, Mar. 22, 1909. A. Reeves Ayres, clerk. W. D. Covington, deputy.

137 In the Circuit Court of the United States for the Western District of Washington, northern division.

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| JAMES H. HOLT, DEFENDANT, AND PLAINTIFF IN ERROR, *vs.* THE UNITED STATES OF AMERICA, PLAINTIFF, AND DEFENDANT in error. | No. 1682. |

*Petition for writ of error.*

And now comes James H. Holt, defendant herein, and says:

That on or about the 8th day of March, A. D., 1909, the Circuit Court entered a judgment herein in favor of the plaintiff and against this defendant in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

CALDWELL & RIDDELL,
*Attorneys for Defendant, and Plaintiff in Error.*

(Endorsed:) Petition for writ of error. Filed U. S. Circuit Court, Western District of Washington, Mar. 22, 1909. A. Reeves Ayres, clerk. W. D. Covington, deputy.

138 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

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| UNITED STATES OF AMERICA, PLAINTIFF and defendant in error, *vs.* JAMES H. HOLT, DEFENDANT AND PLAINTIFF in error. | No. 1682. |

*Order allowing writ of error.*

This 22nd day of March, 1909, comes the defendant, James H. Holt, by his attorneys, Caldwell & Riddell, and files herein and presents to the court his petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error, and does further order that said writ of error shall operate as a supersedeas and that the operation and execution of the judgment heretofore rendered herein be stayed and suspended until said writ of error is heard and final judgment thereon rendered by the Supreme Court of the United States.

Done in open court this 22nd day of March, A. D. 1909.

C. H. HANFORD, *Judge.*

(Endorsed:) Order allowing writ of error. Filed U. S. Circuit Court, Western District of Washington, March 22, 1909. A. Reeves Ayres, clerk. W. D. Covington, deputy.

139 In the Supreme Court of the United States.

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| JAMES H. HOLT, DEFENDANT AND plaintiff in error, *vs.* UNITED STATES OF AMERICA, PLAINTIFF and defendant in error. | No. 1682. |

*Writ of error.*

THE UNITED STATES OF AMERICA, *ss.*

*The President of the United States of America to the judges of the Circuit Court of the United States for the Western District of Washington, greeting:*

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said Circuit Court before the Honorable C. H. Hanford, one of you, between the United States of America, plaintiff and defendant in error, and James H. Holt, defendant and plaintiff in error, a manifest error has happened to the great damage of the said James H. Holt, as by his complaint appears, we being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington within sixty days from the date hereof in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected,

140 the said Supreme Court may cause further to be done to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 22nd day of March, in the year of our Lord one

thousand nine hundred and nine, and of the independence of the United States of America the one hundred and thirty-third.

[SEAL.] A. REEVES AYRES,
*Clerk of the Circuit Court of the United States for the Western District of Washington, northern division.*
By W. D. COVINGTON,
*Deputy Clerk, U. S. Circuit Court, Western District of Washington.*

The above writ of error allowed this 22nd day of March, 1909.

C. H. HANFORD,
*District Judge, holding the Circuit Court of the United States for the Western District of Washington.*

(Endorsed:) Writ of error. Filed U. S. Circuit Court, Western District of Washington, March 22, 1909. A. Reeves Ayres, clerk. W. D. Covington, deputy.

141 In the Supreme Court of the United States.

JAMES H. HOLT, DEFENDANT, AND PLAINTIFF IN ERROR,
*vs.*
UNITED STATES OF AMERICA, PLAINTIFF, AND DEFENDANT in error. } No. 1682.

*Copy of writ of error, for defendant in error.*

THE UNITED STATES OF AMERICA, *ss.*

*The President of the United States of America to the Judges of the Circuit Court of the United States for the Western District of Washington, greeting:*

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court before the Honorable C. H. Hanford, one of you, between the United States of America, plaintiff and defendant in error, and James H. Holt, defendant and plaintiff in error, a manifest error has happened, to the great damage of the said James H. Holt, as by his complaint appears, we being willing that the error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington within sixty days from the date hereof, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done
142 to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 22nd day of March, in the year of our Lord one thousand nine hundred and nine, and of the independence of the United States of America the one hundred and thirty-third.

[SEAL.] A. REEVES AYRES,
*Clerk of the Circuit Court of the United States for the Western District of Washington, Northern Division.*
By W. D. COVINGTON,
*Deputy Clerk, U. S. Circuit Court, Western District of Washington.*

The above writ of error allowed this 22nd day of March, 1909.

C. H. HANFORD,
*District Judge holding the Circuit Court of the United States for the Western District of Washington.*

(Endorsed:) Copy of writ of error; for defendant in error. Filed U. S. Circuit Court, Western District of Washington, March 22, 1909. A. Reeves Ayres, clerk. W. D. Covington, dep.

143 In the Supreme Court of the United States.

JAMES H. HOLT, DEFENDANT, AND PLAINTIFF IN ERROR,
*vs.*
UNITED STATES OF AMERICA, PLAINTIFF, AND DEFENDANT in error. } No. 1682.

*Citation to defendant in error.*

THE UNITED STATES OF AMERICA, *ss.*

*To the United States of America, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington on the twenty-first day of May next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, northern division, wherein James H. Holt is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Seattle, in the circuit and district above named, this twenty-second day of March, in the year of our Lord one thousand nine hundred and nine.

[SEAL.] C. H. HANFORD,
*Judge of the District Court of the United States for the Western District of Washington, presiding in said Circuit Court.*

Service of the within citation to defendant in error by receipt of a copy hereof is acknowledged this twenty-second day of March, A. D. 1909.

ELMER E. TODD,
*United States Attorney.*

(Endorsed:) Citation to defendant in error. Filed U. S. Circuit Court, Western District of Washington, March 22, 1909. A Reeves Ayres, clerk. W. D. Covington, deputy.

144 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

UNITED STATES OF AMERICA, PLAINTIFF, AND DEFENDANT IN ERROR,
*vs.*
JAMES H. HOLT, DEFENDANT, AND PLAINTIFF IN ERROR. } No. 1682.

*Precipe for record on writ of error.*

*To the clerk of the above-entitled court:*

You will please prepare at once transcript of the record in the above-entitled cause on writ of error to the Supreme Court of the United States and forward the same to the clerk of that court, including in the transcript the following papers necessary to the determination of the questions to be passed upon by said Supreme Court:

1. Indictment.
2. Demurrer to the indictment.
3. Journal entry of order overruling demurrer.
4. Plea of not guilty.
5. Your certificate setting forth in totidem verbis and authenticating rule numbered fifty-six of this court.
6. Your certificate setting forth in totidem verbis and authenticating rule numbered fifty-eight of this court.
7. Verdict.
8. Motion in arrest of judgment.
9. Order overruling motion in arrest of judgment.
10. Motion for examination of jurors.

145 11. Order overruling motion for examination of jurors.
12. Motion for new trial.
13. Order overruling motion for new trial.
13½. Court's opinion.
14. Judgment.
15. Bill of exceptions.
16. Petition for writ of error.
17. Order allowing writ of error.
18. Writ of error.
19. Defendant in error's copy of writ of error.

20. Assignment of errors.
21. Citation.
22. Order to forward to clerk of Supreme Court plaintiff's Exhibit B.
23. Send plaintiff's Exhibit B.
24. Send original writ of error, as well as include copy in transcript.
25. Send original citation, as well as include copy in transcript.
26. This precipe.
27. All indorsements of any kind whatsoever appearing on any of the above-named papers.

CALDWELL & RIDDELL,
*Attorneys for said James H. Holt,*
*Defendant, and Plaintiff in Error.*

(Endorsed:) Precipe for record on writ of error. Filed U. S. Circuit Court, Western District of Washington, Apr. 5, 1909. A. Reeves Ayres, clerk. W. D. Covington, deputy.

146 In the Circuit Court of the United States for the Western District of Washington, Northern Division.

JAMES H. HOLT, DEFENDANT, AND PLAINTIFF IN ERROR,
*vs.*
THE UNITED STATES OF AMERICA, PLAINTIFF, AND DEFENDANT IN ERROR. } No. 1682.

*Clerk's certificate to transcript of record.*

UNITED STATES OF AMERICA,
*Western District of Washington, ss:*

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify the foregoing one hundred fifty-one (151) typewritten pages, numbered from 1 to 151, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and foregoing entitled cause, as is called for by the præcipe of the attorneys for the defendant, and plaintiff in error, as the same remain of record and on file in the office of the clerk of the said court, and that the same, together with the original exhibit, separately certified, constitute the return to the annexed writ of error.

I further certify that I annex hereto and herewith transmit the original writ of error and citation.

I further certify that the cost of preparing and certifying the foregoing transcript is the sum of $108.30, and that the said sum will be included in my quarterly account for fees against the United States for the quarter ending June 30, 1909.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court, at Seattle, in said district, this 8th day of May, 1909.

[SEAL.]

A. REEVES AYRES, *Clerk.*
By W. D. COVINGTON,
*Deputy Clerk.*

147 In the Supreme Court of the United States.

JAMES H. HOLT, DEFENDANT, AND PLAINTIFF IN ERROR,
*vs.*
UNITED STATES OF AMERICA, PLAINTIFF, AND DEFENDANT in error. } No. 1682.

*Writ of error.*

THE UNITED STATES OF AMERICA, *ss.*

*The President of the United States of America to the judges of the Circuit Court of the United States for the Western District of Washington, greeting:*

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said Circuit Court before the Honorable C. H. Hanford, one of you, between the United States of America, plaintiff, and defendant in error, and James H. Holt, defendant, and plaintiff in error, a manifest error has happened to the great damage of the said James H. Holt, as by his complaint appears, we being willing that the error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington within sixty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of
148 the United States, this 22d day of March, in the year of our Lord one thousand nine hundred and nine, and of the independence of the United States of America the one hundred and thirty-third.

[SEAL.]

A. REEVES AYRES,
*Clerk of the Circuit Court of the United States for the Western District of Washington, Northern Division.*
By W. D. COVINGTON,
*Deputy Clerk, U. S. Circuit Court, Western District of Washington.*

The above writ of error allowed this 22nd day of March, 1909.

C. H. HANFORD,
*District Judge, holding the Circuit Court of the United States for the Western District of Washington.*

(Indorsed:) No. 1682. In the Supreme Court of the United States. James H. Holt, defendant, and plaintiff in error, vs. United States of America, plaintiff, and defendant in error. Writ or error. Hugh M. Caldwell, C. F. Riddell, attorneys for plaintiff in error, Pioneer building, Seattle, Washington. Filed, U. S. Circuit Court, Western District of Washington, Mar. 22, 1909. A Reeves Ayres, clerk. W. D. Covington, deputy.

150 In the Supreme Court of the United States.

JAMES H. HOLT, DEFENDANT, AND PLAINTIFF IN ERROR,
*vs.*
UNITED STATES OF AMERICA, PLAINTIFF, AND DEFENDANT in error. No. 1682.

*Citation to defendant in error.*

THE UNITED STATES OF AMERICA, *ss.*

*To the United States of America, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington, on the twenty-first day of May, next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein James H. Holt is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Seattle, in the circuit and district above named, this twenty-second day of March, in the year of our Lord one thousand nine hundred and nine.

[SEAL.] C. H. HANFORD,
*Judge of the District Court of the United States for the Western District of Washington, Presiding in said Circuit Court.*

151 Service of the within citation to defendant in error by receipt of a copy hereof is acknowledged this twenty-second day of March, A. D. 1909.

ELMER E. TODD,
*United States Attorney.*

(Indorsed:) No. 1682. In the Supreme Court of the United States. James H. Holt, defendant, and plaintiff in error, vs. United States

of America, plaintiff, and defendant in error. Citation to defendant in error. Hugh M. Caldwell, C. F. Riddell, attorneys for plaintiff in error, Pioneer building, Seattle, Washington. Filed U. S. Circuit Court, Western District of Washington, Mar. 22, 1909. A. Reeves Ayres, clerk. W. D. Covington, deputy.

(Indorsement on cover:) File No. 21,700. W. Washington, C. C. U. S. Term No. 474. James H. Holt, plaintiff in error vs. The United States. Filed May 29th, 1909. File No. 21,700.

○

Supreme Court, U. S.
FILED.
OCT 7 1910
JAMES H. McKENNEY,
Clerk.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1909.

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JAMES H. HOLT, *Plaintiff in Error,*
vs.
THE UNITED STATES OF AMERICA, *Defendant in Error.*

No. 231.

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## MOTION FOR LEAVE TO FILE CERTIFIED COPY OF RULE OF TRIAL COURT.

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HUGH M. CALDWELL,
C. F. RIDDELL.
JOHN LEWIS SMITH.
Attorneys for Plaintiff in Error.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1909.

JAMES H. HOLT, *Plaintiff in Error,*
vs.
THE UNITED STATES OF AMERICA, *Defendant in Error.*
No. 474.

## MOTION FOR LEAVE TO FILE CERTIFIED COPY OF RULE OF TRIAL COURT.

Comes now the said plaintiff in error and moves the honorable court for leave to file a certified copy of rule 97 of the United States Circuit Court for the Western District of Washington, Northern Division, and for the reasons therefor he states:

This case comes before this court upon a writ of error to said Circuit Court. The eleventh error assigned is a refusal of said Circuit Court to allow a challenge for cause to a venireman on the ground of implied bias. (R. 76). Said rule 97 provides: "In all criminal trials the designation, impaneling and challenging of jurors shall conform to the laws of this State existing at the time, except as otherwise provided by Acts of Congress or the rules of this court."

Said rule is and, since the year 1904, has been the only rule in force in said court on the subjects to which

said rule relates. When the record herein was printed a certified copy of said rule was omitted. Plaintiff in error, therefore, requests the honorable court for permission to file, at this time, as a part of the record herein, a copy of said rule duly certified by the clerk of said Circuit Court, which said copy plaintiff in error herewith presents to the Court.

Respectfully submitted,

HUGH M. CALDWELL,
C. F. RIDDELL,
JNO. LEWIS SMITH,
*Attorneys for Plaintiff in Error.*

To the Solicitor General,

Attorney for the defendant in error in the above entitled case:

You are hereby notified that the plaintiff in error in the above named cause will, on Monday, the 10th day of October, A. D. 1910, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court, the foregoing motion.

HUGH M. CALDWELL,
C. F. RIDDELL.
JOHN LEWIS SMITH.
Attorneys for Plaintiff in Error.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1909.

JAMES H. HOLT,
*Plaintiff in Error,*
*vs.*
THE UNITED STATES OF AMERICA,
*Defendant in Error.*
No. 474.

## MOTION TO ADVANCE.

Comes now the said plaintiff in error and moves the honorable court to advance this cause upon the docket, and hear it in the month of November, A. D. 1910, if the convenience of the court will permit, and for the reasons therefor, he states:

This case comes before this court upon a writ of error to the Circuit Court of the United States for the Western District of Washington, Northern Division. The plaintiff in error was arrested by the United States military authorities at Fort Worden, Washington, on the 9th day of May, 1908, charged with having murdered one Henry E. Johnson on the preceding night. At the time said Johnson was killed, both he and the plaintiff in error were soldiers in the artillery service of the United States, stationed at said Fort Worden. After detaining the plaintiff in error at said fort for several days, he was taken to the King County jail,

at Seattle, Washington, where he has since been continuously confined as a prisoner of the United States.

That on the 22nd day of May, 1908, the plaintiff in error was indicted separately, and also jointly with one Thomas H. Knight, under Section 5339, U. S. R. S., by the grand jury sworn and charged to inquire within and for the said Western District of Washington, Northern Division. Thereafter, beginning on the 11th day of December, 1908, plaintiff in error was tried under said separate indictment. On the 22nd day of December, 1908, the jury returned a verdict, finding the plaintiff in error "guilty, without capital punishment." Thereafter motions for a new trial and in arrest were filed, and, upon hearing, overruled, and on the 8th day of March, 1909, sentence was imposed, directing that said plaintiff in error be confined at hard labor at the United States penitentiary at McNeil's Island, Washington, for the term of his natural life. Thereafter a writ of error was issued on March 22nd, 1909, and a transcript of the record filed in this court in May, 1909. The record shows forty-six assignments of error; the errors include the basing of the indictment upon incompetent evidence, insufficiency of the indictment, the admission in many instances of incompetent and prejudicial testimony over the objection of plaintiff in error, misconduct of the District Attorney, misconduct of the jury, erroneous and prejudicial instructions, refusal to give requested instructions, permitting the jury to separate, and permitting them to read newspaper accounts of the trial and comments thereon during the progress of the trial.

A conviction was had solely upon circumstantial evidence.

At the time of his arrest in May, 1908, plaintiff in error was twenty-one years of age. Since that time he has been, and now is, confined in the King County jail, at Seattle, Washington, where he is being boarded at the expense, and

as a prisoner, of the United States. Said jail is located below the surface of the ground, and is neither adapted to, nor intended for, the incarceration of prisoners for a period of more than one year at a time. His health may become seriously affected by a prolonged confinement in said jail. Practically all of the witnesses in the case are soldiers in the United States Army; some have been dismissed, some transferred to distant parts, and plaintiff in error fears that by great delay he may be unable to secure the presence of those whom he desires in the event that he is granted a new trial.

Plaintiff in error is informed that unless his case is advanced it will not be heard prior to January, 1911, and therefore respectfully prays that the same be advanced and set for hearing in the month of November, 1910, if the convenience of the court will permit.

Respectfully submitted,

JNO. LEWIS SMITH,
*Attorney for Plaintiff in Error.*

To the Solicitor General.

Attorney for the defendant in error in the above entitled case:

You are hereby notified that the plaintiff in error in the above named cause will, on Monday the 14 day of March, A. D. 1910, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the foregoing motion.

JNO. LEWIS SMITH,
*Attorney for Plaintiff in Error.*

OCT 7 1910
JAMES H. McKENNEY

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

NO. 231

JAMES H. HOLT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

## BRIEF OF PLAINTIFF IN ERROR

HUGH M. CALDWELL,
C. F. RIDDELL,
JNO. LEWIS SMITH,
*Attorneys for Plaintiff in Error.*

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

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NO. 474.

JAMES H. HOLT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

---

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

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## STATEMENT.

The plaintiff in error, James H. Holt, was, after a jury trial in the circuit court of the United States, for the Western District of Washington, Northern Division, found guilty on the 22nd day of December, 1908, of murder, under Section 5339, U. S. R. S., the verdict being qualified by the addition of the words: "without capital punishment." (R. 4). From a sentence to the penitentiary for the period of his life (R. 17), the plaintiff in error brings the case to this court (R. 87).

The accused was, on the 8th day of May, 1908, an enlisted soldier, 21 years of age, in the Coast Artillery Corps of the United States Army, stationed at a place known as Fort Worden, in the State of Washington.

He was a first-class gunner of the 108th Company, Coast Artillery, but at and prior to said 8th day of May, was detailed as Assistant Cook in the Band Barracks. One Henry

E. Johnson, a Corporal in the Coast Artillery, stationed at the same place, was a member of the Band. At times, when off duty, Johnson was also a cobbler; had his shop in the basement of the Band Barracks, and lived just outside of the limits of the Fort.

On the 9th day of May, 1908, a body, afterwards identified as that of Johnson, was discovered in the heating furnace of the basement of the Band Barracks, in a charred and almost unrecognizable condition. It was the theory and contention of the United States, that May 8 having been payday at the Fort, and Johnson having about $39 in his possession, plaintiff in error, "together with one Thomas H. Knight, a former soldier, then civilian tailor at the Fort and one Grieble for the purpose of getting this $39, murdered Johnson in his cobbler shop in the basement of the Band Barracks, robbed him, went to Port Townsend, a few miles distant, spent the money riotously, and that Knights being helplessly drunk, Holt and Grieble returned to the Fort at reveille at 5:45 A. M., put Johnson's body in the heating furnace, and returned to Port Townsend, where they were arrested.

It was not claimed or shown that there was any other possible motive for the alleged crime than the desire to obtain said $39, the amount of which it is contended Holt was aware. Grieble, Holt and Knight were all arrested. Grieble was never indicted, Holt was indicted separately, and a joint indictment against Holt and Knight was also returned. On the trial, all attempt to show Grieble's connection with the murder was abandoned, and Holt was tried on a separate indictment.

The Government attempted to prove the ultimate fact of Holt's guilt by evidence as to his movements and whereabouts, and certain other circumstances from which the jury was asked to deduce the fact of his guilt.

The arrest of plaintiff in error occurred about 8 o'clock on the morning of May 9, shortly after the body was discovered in the furnace at the Fort. He was taken under military guard to the Guardhouse at said Fort, where he was placed in solitary confinement (R. 35). And, after a time, denied eating utensils and certain privileges, such as shaving and smoking. A Board of Inquiry had been appointed by the Commanding Officer on the morning of said 9th day of May, for the purpose of discovering the identity of the deceased, of placing the responsibility for his death, and of securing the apprehension of the guilty parties.

Plaintiff in error was taken, handcuffed, before said Board, composed of his superior officers in the U. S. Army, several times during the few days next succeeding the finding of the body; and, by promises that it would be easier

POOR COPY

for him if he confessed the crime, by threats of mob violence, by false and misleading statements of his superior officers that the others with him had confessed and put it all on him, and by following similar discountenanced and abhorred works of the "Third Degree," it was claimed that plaintiff in error made to one of his superior officers—Captain Newton—statements of a damaging nature, implicating Knight, the tailor, Grieble and himself, in the murder of Johnson. In fact, the prosecutor referred to the same as "a confession," (R. 27) and argued to the court, in the presence of the jury (R. 44-55) that the defendant had "confessed" the crime with which he was charged. Testimony of Captain Newton of what he alleged plaintiff in error had so told him, before Holt was permitted to see any one, or obtain counsel, and what the prosecutor called a "confession" was presented to the grand jury, and upon that testimony, in part, plaintiff was indicted, although testimony of said alleged statements was excluded on the trial on the merits as incompetent, after counsel for plaintiff in error had, for about two hours in the presence of the jury, combatted this introduction because wholly incompetent.

While there is enough shown in the record from the newspapers (R. 66-72) in the affidavit on motion for an examination of the jurers, to prejudice the defendant in the mind of a person reading the same, we are aware that this court is not concerned with the question of fact, to-wit: the guilt or innocence of the defendant, but merely in the question whether he was denied a fair and impartial trial, according to law.

*Burton v. U. S.* 202, U. S. 344, 373; 50 Law Ed. 1057.

Following the case of *Lees v. U. S.* 150, U. S. 476; 37 Law Ed. 1150, only so much of the record is brought up as shows the points relied upon for reversal.

## INSUFFICIENCY OF INDICTMENT.

Under this heading will be discussed assignments of error Numbered 1, 2, 3, 4, 5 and 6. Assignments 1, 2, 3 and 4 (R. 75) raise the point that the indictment (R. 1, 2) does not state that the place where the crime is alleged to have been committed, was at the time of its commission or at any other time, under the exclusive jurisdiction of the United States. They are as follows:

First. The indictment does not state that the place where the crime is alleged to have been committed was at any time under the exclusive jurisdiction of the United States.

Second. The court erred in overruling defendant's demurrer to the indictment on the ground that said indictment does not state that the place where the crime is alleged to have been committed was at any time under the exclusive jurisdiction of the United States.

Third. The indictment does not state that the place where the crime is alleged to have been committed was, at the time when the crime is alleged to have been committed, under the exclusive jurisdiction of the United States.

Fourth. The court erred in overruling the demurrer of defendant to the indictment on the ground that said indictment does not state that the place where the crime is alleged to have been committed was, at the time when the crime is alleged to have been committed, under the exclusive jurisdiction of the United States.

The portion of the indictment alleging place is as follows (R. 1, 2):

"That one James H. Holt, on the 8th day of May, A. D. 1908, within the Fort Worden Military Reservation, a place under the exclusive jurisdiction of the United States of America, and within the Western District of Washington, Northern Division, did with force and arms an assault make upon one Henry E. Johnson * * *"

There are no crimes against or cognizable in the courts of the United States, except such as are defined or provided for by act of Congress.

*U. S. v. Eaton,* 144 U. S. 677, 36 L. Ed. 591.
*Benson v. McMahon,* 127 U. S. 457, 32 L. Ed. 234.
*U. S. v. Britton,* 108 U. S. 199, 27 L. Ed. 698.
*Tennessee v. Davis,* 100 U. S. 257, 25 L. Ed. 648.

The indictment in this case is based upon Sec. 5339 U. S. R. S. (R. 1). The only portion of said Section applicable is as follows:

"Every person who commits murder * * *

"First. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;

"Second. * * *

"Third. * * * shall suffer death."

Under this statute two things are essential, to constitute the crime of murder against the United States. First, the person charged must kill a human being under such circum-

stances as to constitute murder. Second, the killing must be within a place under the exclusive jurisdiction of the United States, at the time of such killing.

In order to sufficiently charge a person with murder under the laws and in a court of the United States, both of these facts must be charged in the indictment or it will be insufficient. To recite therefore:

"That one James H. Holt, on the 8th day of May, A. D. 1908, within the Fort Worden Military Reservation, a place under the exclusive jurisdiction of the United States of America, and within the Western District of Washington, Northern Division, did with force and arms, an assault make, etc."

does not charge that the said Fort was on the 8th of May, 1908, or on any other date, under the exclusive jurisdiction of the United States, for it is perfectly consistent with such an averment that Fort Worden was under the exclusive jurisdiction of the United States at the time when the indictment was returned, or, on the other hand, was only under such exclusive jurisdiction, long prior to the date laid in the indictment and had since ceased to be.

The indictment is not according to approved forms.

*Wharton's Precedents of Indictments and Pleas*, pp. 14, 16.

Every ingredient of which the offense is composed must be accurately and clearly expressed in the indictment and must be charged positively and not inferentially.

*U. S. v. Simmons*, 96 U. S. 360, 24 L. Ed. 819.
*U. S. v. Mann*, 95 U. S. 580, 24 L. Ed. 531.
*U. S. v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588.
*U. S. v. Cook*, 17 Wall. 168, (84 U. S.) 23 L. Ed. 538.
*U. S. v. Hess*, 124 U. S. 483, 31 L. Ed. 516.
*Evans v. U. S.*, 153 U. S. 584, 38 L. Ed. 830.
*U. S. v. Cooly*, 4 Cranch, C. C. 707, Fed. Cas. U. S. 14859.
1 *Bishop Cr. Proc.*, 2d ed. Sec. 81.
*Archb. Cr. Pl. & E.*, 18th ed. 54, 265.
*Archb. Cr. Pr. & Pl.* 87.
*U. S. v. Potter*, 56 Fed. 103.
*People v. Willis*, 54 N. Y. Sup. 128, 136.
*State v. Rowell*, 70 Vt. 411, 41 Atl. 432.
*Pritchard v. People*, 149 Ill. 50, 36 N. E. 103.
*State v. Gaffrey*, 3 Pin. (Wis. 1851) 369, 371.

*State v. Patrick*, 3 Wis. 812, 814.
*Fouts v. The State*, 8 Ohio St. 98, 113.
*Thomas v. Commonwealth*, 2 Rob. (Va. 1843) 795.
*State v. Gallaugher*, v23 Iowa 378, 98 N. W. 906.
*State v. Ashpole*, 127 Iowa 680, 104 N. W. 281.
*State v. Hagan*, 164 Mo. 654, 65 S. W. 249.
*State v. Gassard*, 103 Mo. App. 143, 77 S. W. 473.
*State v. Furgerson*, 152 Mo. 92, 53 S. W. 429.
*Moline v. State*, 67 Neb. 164, 93 N. W. 228.
*State v. Eddy*, 46 Ore. 625, 81 Pac. 941.
*Kearney v. State*, 48 Md. 16.
*People v. Logan*, 1 Nev. 110.
*State v. Halder*, 2 McCord 377, 13 Amer. Dec. 738.
*Cook v. State*, 72 Miss. 517, 17 So. 228.
*Banks v. State*, 157 Ind. 197, 60 N. E. 1087, 1090.
*State v. Rector*, (Mo.) 23 S. W. 1074.

In the *Simmons case, supra*, the alleged crime was charged in the following words, being the words of the statute, that the defendant

"did knowingly and unlawfully cause and procure to be used a still, boiler and other vessels, for the purpose of distilling within the intent and meaning of the Internal Revenue Laws of the United States in a certain building and on certain premises where vinegar was manufactured or produced, against the peace of the United States and their dignity, etc."

Referring to such a recital, Mr. Justice Harlan, said:

"Nor does it sufficiently appear that vinegar was manufactured or produced in the building and on the premises referred to *at the time* the still and other vessels were used for the purpose of distilling. It is consistent with the averments that the vinegar had been manufactured or produced long prior to the date when the alleged distilling occurred. The two facts must *co-exist* in order to constitute the offense described in the statute." (Italics ours.)

As stated by Mr. Justice Clifford, in *United States v. Mann, supra*:

"* * * the rule is universal, that every ingredient of which the offense is composed must be accurately and clear-

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ly expressed in the indictment or information, or the pleading will be held bad on demurrer."

In *U. S. v. Cruikshank, supra,* it is said:

"We may suspect that 'race' was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offense, and cannot be supplied by implication. Every thing essential must be charged positively, and not inferentially. The defect here is not in form, but in substance."

In *State v. Gaffrey, supra,* it is said:

"But the third point raised by the defendants' counsel is fatal. The offense of arson is local in its nature (Arch. Crim. Plead. 53), and requires a local description of the building, the subject of arson. The words, 'there situate,' are material. For aught that appears in the indictment, the barn might have been situate in the State of Illinois. Besides, it is an invariable rule in criminal pleadings that a venue must be laid of every material fact and issuable allegation contained in an indictment for felony. *Arch. Crim. Law,* 45, and cases cited; also forms in 3 *Chitty,* 1127."

In *State v. Patrick, supra,* it is said:

"It is true, we might infer from the averment of an assault upon Wethersbee, by the accused that if an intent to kill and murder was coupled with that assault, it must have been to kill and murder the person assaulted; but we arrive at such a conclusion by inference or argument only, and neither one or the other can be indulged in or deemed sufficient to supply a deficient averment in an indictment."

In *Fouts v. The State, supra,* it is said:

"It is an invariable rule, that an indictment must charge the crime with certainty and precision, and must contain a complete description of such facts and circumstances as will constitute the crime. * * * and a statement of *any one* of those facts or circumstances as *a legal result,* or by way of *inference* or *conclusion* from antecedent averments is bad, and fatal to the indictment. 1 *Chitty's Cr. Law,* 228; 1 *Archb. Cr. Pl.* (Wat.) 87."

In *State v. Gallaugher, supra,* it is said in referring to an indictment for perjury:

"It is only by the merest inference or intendment that we find any such charge in this indictment, and even under our liberal system of criminal pleading it is well settled that an indictment cannot be aided by intendment or inference. *State v. Potter,* 28 Iowa 554; *State v. Clark,* 80 Iowa 517, 45 N. W. 510; *State v. Jamison,* 110 Iowa 341, 81 N. W. 594."

In *State v. Gassard, supra,* it is said:

"There appears to be scarcely a principle in criminal pleading more inflexibly and generally established and upheld than that in an indictment nothing material shall be taken by intendment or implication; that in all prosecutions for felonies everything constituting the offense must be pleaded with certainty and clearness; nothing must be left to be implied. *State v. Thierauf,* 167 Mo. 429, 67 S. W. 292; *State v. Hagen,* 164 Mo. 654, 65 S. W. 249; *State v. Phelan,* 159 Mo. 122, 60 S. W. 71; *State v. Patterson,* 159 Mo. 98, 59 S. W. 1104; *State v. Evans,* 128 Mo. 406, 31 S. W. 34; *State v. Rector,* 126 Mo. 328, 23 S. W. 1074; *State v. McGinnis,* 126 Mo. 564, 29 S. W. 842."

In *Kearney v. The State, supra,* it is said:

"The want of a direct allegation of anything material in the description of the substance, nature or manner of the crime, cannot be supplied by intendment, and hence, it has always been held that it is an essential requisite in every indictment that it should allege all matters material to constitute the particular crime charged, with such positiveness and directness, as not to need the aid of intendment or implication. 2 *Hawk P. C.,* ch. 25, Sec. 60; *Deckard v. The State,* 38 Md. 201."

In *State v. Halder, supra,* it is said:

"In the development of the general rule that certainty is necessary in an indictment, it is laid down that it must be certain to every intent, and without any intendment to the contrary; 1 *Chitty,* C. L. 141, 172, and the offense must be positively charged, and not by the way of recital; 2 Str. 900; 2 *Ld. Raym.* 1363."

In *Cook v. State, supra,* of an indictment for murder, omitting the word, "did," it was said:

"Unless the court shall supply by intendment something plainly omitted, and read into the charge some word or words

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plainly not there, no certain offense is laid. If we concede that the accused, the trial court, and the jury all knew what was intended to be charged, and that an actual trial was had below, on full proof, of the appellant upon a charge of murder, still all have not, by the concession, received any light on the question presented, viz.: Was the indictment a valid one, substantially charging a capital crime? Or was it void, charging no crime, and therefore assailable anywhere? * * * Regretting the necessity of ever reversing any judgment after full trial, unless upon the merits, we yet must not forget that it is our sworn duty to maintain unbroken the constitutional safeguards of the lives and liberties of the people. The judgment below will be reversed. * * *"

In *State v. Hagan, supra*, trial for murder, it is said:

"If any fact, word, or circumstance which forms a necessary ingredient in or a material description of the offense be omitted in the indictment, such omission vitiates the indictment, and of such vitiation defendent may advantage himself by demurrer, motion in arrest, or by writ of error. *Rex. v. Osmer,* 5 East. 304; *Rex. v. Everett,* 8 Barn & C. 114; *Reg. v. Norton,* 8 Car & P. 196; *Rex v. Jackson,* 1 Leach, 267."

In *Pritchard v. People, supra*, the indictment for bigamy, charged that defendant did marry one Eliza Ann S. and her then and there had for his wife, and that he afterwards feloniously and unlawfully did marry and take to wife, one V. M. L., "the said Joseph Ferguson Pritchard well knowing the said Eliza Ann Ferguson, his former wife, was then alive"; it was held that the indictment did not sufficiently allege that the former wife was living at the time of the second marriage. The court said:

"There is, however, no direct averment in the indictment in this case that, at the time of the defendant's second marriage, his first wife was living. Reliance is placed upon the averment that the defendant at the time of his second marriage, knew that his first wife was living. If this is to be taken as an allegation that his former wife was then living, it is merely argumentative. The allegation being that the defendant knew that his former wife was living, it is sought to be inferred, by way of argument, that she must have been in fact living. But it is an elementary rule of pleading, both civil and criminal, that allegations of fact in pleadings should be direct and positive, and not merely argumentative and inferential. Nor are we disposed to hold that this rule of pleading, in its application to criminal in-

dictments, is abrogated by section 408 of the Criminal Code which provides that 'every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense can be easily understood by the jury.' "

As an illustration of the way in which the ruling of this court will be accepted by the lower courts, should the indictment herein be deemed sufficient in this particular, note the following as justifying the ruling upon the sufficiency of an indictment for resisting an officer:

"In *St. Clair v. U. S.*, 154 U. S. 134, 146, the Supreme Court, in a capital case, did not require critical accuracy in repeating words alleging knowledge, but left something for inference, and here, in view of a long continued and recognized form of pleading, which leaves behind no substantial doubt as to what was *intended* to be alleged, we must hold the indictment sufficient."

*Blake v. U. S.*, 71 Fed. 286, 291; 18 C. C. A. 121.

In *Jane v. The State*, 3 Mo. 61, 63, referring to indictments, it is said:

"It must be certain to every intent. This is peculiarly the doctrine in capital cases."

INDICTMENT INSUFFICIENT IN THAT THE ASSAULT IS NOT CHARGED TO BE FELONIOUS.

Fifth. The indictment does not state that the assault therein alleged to have been made by the defendant upon the deceased was made "feloniously and with malice aforethought."

Sixth. The court erred in overruling defendant's demurrer to the indictment on the ground that said indictment does not state that the assault therein alleged to have been made by defendant upon the deceased was made "feloniously and with malice aforethought." (R. 75.)

This indictment omitted the allegations contained in *Anderson v. United States*, 170 U. S. 481, 42 L. Ed. 1116, and the precedents according to which it was prepared that the plaintiff in error did, with force and arms, "feloniously and with malice aforethought make an assault" upon one Henry E. Johnson, etc..

The preceding words within quotation marks are matter of substance and not a "defect or imperfection in matter of form only" within the meaning of Section 1025 of the revised statutes.

An indictment is unsufficient which does not charge that the assault, which is one of the material acts alleged to have been committed by the defendant in the commission of the crime, was done wilfully, feloniously and with malice aforethought.

*Wharton's Precedents of Indictments and Pleas*, p. 42.

It is said in *Chase v. The State*, 50 Wis. 510, 517, in passing upon the sufficiency of information charging murder consisting of two counts:

"But admitting that the first count of the information is bad for the reason suggested, we are of the opinion that the conviction and judgment must be sustained under the second count. That count contains what is declared by statute to be a sufficient information for murder; and the fact that the means by which the murder was committed may not be sufficiently stated, does not vitiate it. This count is the exact converse of the first. It has a conclusion, which charges 'that the defendant in manner and form aforesaid, then and there feloniously, wilfully and of his malice aforethought, did kill and murder the said Frank Goodhue;' but the facts before stated in the count as constituting the murder are not so stated as to show in legal language that a murder was in fact committed; *the defect being that the assault is not charged to have been made upon the deceased feloniously, wilfully and with malice aforethought.* But as the statute provides that it shall not benecessary to set out the manner in which, or the means by which, the death of the deceased was caused, and that it shall be sufficient in an information for murder to charge that the accused did wilfully, feloniously and of his malice aforethought kill and murder the deceased (Section 4660 R. S. 1878), the information must, we think be held good. The omission so characterized the assault in the statement of the facts as to show that it was a murderous one, is not so inconsistent with the general allegation that the defendant did, by such assault and wounding, wilfully, feloniously and of his malice aforethought kill and murder the deceased, as to destroy the force and effect of such general allegation. In order to avoid the effect of the general allegation the previous statements must be so inconsistent with the general allegation of murder, that the

latter, based upon such previous statements of fact, must necessarily be false. We do not think the omission mentioned has that effect upon the general allegation and the count is not bad for that reason."

(The second count charged Charles William Chase, etc. "with force and arms, in and upon one Frank Goodhue, did make an assault, and that the said Charles William Chase, with a certain slung-shot and revolver the said Frank Goodhue, in and upon the head of the said Frank Goodhue, then and there feloniously, wilfully and of his malice aforethought, did strike, bruise and wound, giving," etc., "mortal wounds." * * *)

## *INDICTMENT WAS FOUND UPON INCOMPETENT EVIDENCE.*

Assignments of error 7 and 8 will be discussed together. They are as follows:

"7th. The indictment herein was found on incompetent evidence.

"8th. The court erred and committed an abuse of discretion in overruling defendant's motion for leave to withdraw his plea of 'not guilty' and interpose a plea in abatement, and motion to quash the indictment on the ground that the indictment herein was found on incompetent evidence." (R. 75.)

The plaintiff in error having been indicted at the May, 1908, term of court, and after his demurrer to the indictment had been overruled, entered, on June 15, 1908, a plea of "not guilty." The trial came on during the November, 1908, term of court, and after the panel of jurors to try the defendant had been selected, but not sworn, counsel for plaintiff in error requested that the panel so selected be excluded from the courtroom during the presentation and argument of motion for leave to withdraw the plea of "not guilty" theretofore entered, and to enter a motion to quash the indictment. (R. 24). This request to exclude the panel being denied, the motion to quash was presented, supported by an affidavit (R. 25) of counsel for plaintiff in error, dated December 10, 1908, which set forth:

"That the indictment herein was found at the May term of court, 1908; that one of the witnesses before the grand jury upon whose testimony this indictment was made is Captain Harry W. Newton; that affiants, in their investigation of the facts in this case, have been informed by said Harry W. Newton, that said Newton before said grand jury

testified that this defendant had admitted to him complicity in the murder of the deceased, Henry E. Johnson;" (then it is set out that said Newton detailed the inducements and threats which were made to the plaintiff in error by his superior officers in the army, acting as a Militry Investigating Board, he being then an enlisted soldier, before the plaintiff in error is alleged to have confessed said crime) "that on June 15th, 1908, defendant entered his plea of not guilty; that subsequent to the entry of plea herein and not before were affiants able to obtain a statement of the circumstances attending the making of said alleged statements, and that the investigation by affiants of the circumstances attending the making of said alleged incriminating statements was not concluded until November 12th, 1908, although the same was pursued diligently by affiants; that aside from the testimony aforesaid very little testimony implicating the defendant in the murder of Henry E. Johnson was presented to said grand jury. Wherefore affiants pray for leave to withdraw the plea of not guilty herein, to enter a motion to quash the indictment * * * and that the court examine said Newton, Porter, Harris and Reeder," (superior officers of plaintiff in error) "witnesses now in attendance on this court, and any others found necessary, in order to determine whether the indictment has been legally found."

The learned trial court, in denying the motion, said (R. 26, 27), that if it were necessary to protect the rights of the accused he would disregard any technical ruling which would exclude the plea in abatement, after his plea of not guilty, but that the motion was "based upon the assumption that improper and incompetent evidence has been made the basis of the indictment;" and that the court would see that only "legal and proper evidence" would be submitted to the trial jury, and that "if there is not any to support the indictment there will be none to support a verdict of guilty. * * * If this matter had been urged at the proper time the court would have been obliged to pass upon the competency of the evidence which the grand jury acted upon." (R. 26, 27.)

Just what was the "proper time" in the contemplation of the learned trial judge does not appear; but in denying the motion in arrest of judgment he says (R. 11):

"The court does not know what evidence was submitted to the grand jury," but that the motion is a renewal of the attempt to "show that incompetent evidence, in the nature of a confession by the defendant, was received and considered by the grand jury. * * * Such evidence was offered on the trial and it was excluded by the court, * * * As the

names of the witnesses who testified on the trial are endorsed upon the indictment, there is the presumption that the grand jury was informed by legal evidence of the important facts, and that if no evidence except that which the court deems competent had been submitted a *true bill would have been founded upon it.*"

But, is this the fact? If the learned judge did "not know what evidence was submitted to the grand jury," how can he logically argue that there was sufficient *competent* evidence submitted upon which to found the indictment, unless it be to show to this court that, in his opinion, aside from any question of constitutional rights or fairness of the trial, the plaintiff in error is guilty? But, without any disrespect to the learned judge, we say that we believe that the rulings of the court, and the tone of the opinion indicate that he was not burdened, even before any testimony was introduced, with any presumption that the plaintiff in error is innocent. But can it be said that the grand jury would have viewed the facts in the same light, had their minds not been poisoned against the defendant by the grossly incompetent testimony of Captain Newton to the effect that plaintiff in error had confessed this murder? Statements which the court found had been extorted from him, and which it assumes were used against him to procure the indictment!

But any ruling upon the sufficiency of the evidence to warrant the finding of a true bill, was wholly irrelevant. It is true that the affidavit (R. 26) charges that aside from Newton's illegal testimony there was little offered before the grand jury implicating the defendant; but this is mere surplusage. The prayer is that the witnesses named, not members of the grand jury, be examined "to determine whether or not the indictment has been legally found." The effect was to suggest to the court that defendant's constitutional rights had been violated in obtaining the indictment.

The question raised was whether or not the indictment had been legally found. Clearly it was not, if the defendant's constitutional rights were violated. Aside from all authorities, the opinion of the learned trial judge herein, concedes this, as follows (R. 12):

"It is only in rare instances when a court is convinced by a showing of facts * * * that fundamental principles of jurisprudence have been disregarded in the proceedings of the grand jury, e. g., by compelling an accused person to appear and give incriminating testimony against himself, or where the grand jury was not composed of qualified per-

sons, that a court will set aside an indictment for reasons not apparent on the face of the record."

Is there any difference in spirit or principle between extorting a confession of guilt from an accused person by fear or promises and laying such self-criminating or accusing statements before the grand jury through the medium of the extorter, or, in compelling such accused person himself to go before the grand jury and make the self-criminating statements directly to the grand jury?

The Fifth Amendment to the Constitution declares that:

"No person * * * shall be compelled in any criminal case to be a witness against himself."

This court has held, after an exhaustive review of cases, that this privilege extends to a proceeding before a grand jury.

*Counselman v. Hitchcock*, 142 U. S. 547; 35 L. Ed. 1110.

It is also therein stated that: "It is a reasonable construction, we think, of the constitutional provision that the witness is protected from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him."

It is obvious, however, that all persons accused of violence are not learned in the law, nor advised as to their constitutional rights and privileges, and these persons, by reason of their ignorance and relative helplessness most need the safeguards and protection of the Constitution. The fact, therefore, that they have been denied their constitutional rights in investigations by a grand jury seldom reaches an appellate court in the manner which it did in the *Counselman* case *supra*. In fact we have found no other case in which the question was raised in the same manner as in that case.

It has more frequently happened that an accused person, ignorant of the fact that he has any rights, constitutional or otherwise, has been taken before the grand jury, there asked questions which he did not know he might decline to answer, and under an indicement returned by the grand jury, he has been placed upon trial. To secure him in his rights, therefore, the courts have held that:

Where the defendant is compelled to testify before the grand jury, or confessions are obtained from him by hope inspired by assurances of immunity, or by fear induced by threats, and such confessions caused the indictment, the same is invalid, as no one can be compelled, in a criminal case, to be a witness against himself.

*State v. Froiseth*, 16 Minn. 296 (Gil. 260).
*People v. Haines*, 6 N. Y. Crim. Rep. 103, 1 N. Y. Supp., 55.
*Boone v. People*, 148 Ill. 440, 36 N. E. 99.
*Cullen v. Commonwealth*, 24 Gratt. 624.
*Commonwealth v. Crans*, 3 Pa. L. J. 442.
*People v. Singer*, 18 Abb. N. C. 96; 5 N. Y. Crim. Rep. 2.
*Royce v. Territory*, 5 Okla. 61; 47 Pac. 1083.
*Corley v. State*, 50 Ark. 305; 7 S. W. 255.
*U. S. v. Charles*, 2 Cranch C. C. 76.
*U. S. v. Farrington*, 5 Fed. Rep. 343.
*U. S. v. Kilpatrick*, 16 Fed. Rep. 765, 774.
*U. S. v. Jones*, 69 Fed. Rep. 973, 978.
*Joyce on Indictments*, Sec. 103.

In *State v. Houston*, 50 Iowa 512, where objection was raised after conviction that defendant's wife testified before the grand jury, court said:

"If she testified, and her testimony was unfavorable to her husband, so that it appeared that the indictment was found in whole or in part upon her testimony, possibly the indictment might be quashed upon that ground; but the defendant should judge whether her testimony was favorable or unfavorable before proceeding to trial, and move to quash, if he thought there was ground for it. We think it too late to raise an objection of this kind after conviction."

In *State v. Foiseth, supra*, wherein the defendant was required to appear before the grand jury touching the charge against him, the indictment was set aside notwithstanding the fact that there was other evidence before the grand jury; the court said:

"Among the 'names of witnesses examined before the grand jury' is the name 'B. A. Foiseth.' It appears by the affidavit of the defendant 'that he was required by the grand jury to testify as a witness touching the charge and matters alleged in the indictment against him.' * * * We think

there can be no doubt upon the question. The bill of rights expressly declares that 'no person * * * shall be compelled in any criminal case to be a witness against himself.' *Const.* Art. 1, Sec. 7. * * * The objection is therefore fatal to the indictment."

In *U. S. v. Farrington, supra,* wherein an attorney representing creditors appeared, as special prosecutor before the grand jury, with bank books, various exhibits, originals and copies, from which he read such selections as he chose, and also read the minutes of a hearing, then pending, including the testimony of one of the witnesses who was examined compulsorily against another of the defendant's, the court, in sustaining a motion to quash the indictment, said:

"If there was evidence which authorized an indictment, it was so blended with and obscured by the mass of hearsay, and otherwise incompetent testimony that it was impossible for the jury to distinguish it; and it would be expecting too much of a body, untrained in judicial investigation, to believe that they could discriminate intelligently between the competent and the incompetent evidence, so as to accord due weight to the former and be uninfluenced by the latter. * * * It is not the province of the court to sit in review of the investigations of a grand jury as upon the review of a trial when error is alleged; but in extreme cases, when the court can see that the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence, as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused, the court should interfere and quash the indictment." Quoted in *U. S. v. Terry,* 39 Fed. Rep. 355.

In *People v. Haines, supra,* the defendant, among other witnesses, was subpoenaed, and did attend and testify before the grand jury in the investigation of the charge against himself; the court said:

"If the grand jury, in its investigation of the charge against the defendant, violated the letter and spirit of this constitutional provision, the indictment should undoubtedly be set aside. * * * For the foregoing reasons, I am constrained to come to the conclusion that the indictment was found, not only upon illegal evidence, but that the grand jury, in finding it violated the defendant's constitutional right in compelling him to be a witness against himself."

In *U. S. v. Jones,* 69 Fed. Rep. 973, 978, the court said:

"2. There are exceptional cases where an indictment might be quashed, or a plea in abatement sustained, on the ground of improper conduct upon the part of the grand jurors. If the grand jury required the accused to appear, and compelled him to be sworn and to testify touching the charge against him, the indictment might be set aside. *State v. Froiseth*, 16 Minn. 296 (Gil. 260). If a witness who was incompetent, or disqualified from giving evidence, under the law,—as, for instance, if the wife of the accused testified before the grand jury,—the indictment might be quashed. * * * It is undoubtedly true that all investigations before grand juries ought to be conducted within the well established rules of evidence, and the best evidence of which the case is susceptible ought to be presented, and hearsay testimony excluded."

In *Boone v. People, supra*, it is said, in reversing the case for refusal of lower court to quash the indictment:

"The affidavits in the record show that the defendant was taken from the jail, where he was held in custody, and taken before the grand jury, where he was examined touching the very matter on which that grand jury found an indictment against him, and on which he was placed on trial. A right of the highest character was violated. A privilege sacredly guarded by the constitution was disregarded, and a dangerous innovation on the uniform practice in this state made; a danger so great, if it once became a rule of law that one ignorant of his rights, and it may be also of his danger, unattended by counsel and unprotected by a court, could be called before a grand jury and interrogated, and, as he may believe, compelled to answer charges made against him on a subject-matter of investigation then before that body in which his interest is vital, that we will not stop to inquire into the question as to whether the indictment was found on that testimony alone, or whether that testimony influenced the finding, where, as here, the defendant is in custody charged with a crime, and while so in custody is taken from the jail to be examined about that subject-matter. It is sufficient that so important a right was violated, and such a proceeding had, where an indictment was found under such circumstances."

Investigations before grand juries must be made in accordance with the well-established rules of evidence, and they must have the best legal proof of which the case admits. The prosecuting officer is presumed to be familiar with the rules of evidence, and it is his duty to take care that no evi-

dence is received by the grand jury which would not be admissible in a court upon the trial of the case.

*U. S. v. Kilpatrick,* 16 Fed. Rep. 765, 771.
*U. S. v. Jones,* 69 Fed. Rep. 973, 978.
*Royce v. Ter.,* 5 Okla. 61; 47 Pac. 1083.
I Wharton, Crim. Law, § 493.

Evidence of confessions ought never to be admitted before a grand jury, except under the direction of the court, or unless the prosecuting officer of the Government is present and carefully makes the peliminary inquiry necessary to render the evidence admissible.

*U. S. v. Kilpatrick, supra.*

The rule which may be adduced from the authorities, and which seems most consistent with the policy of the law, is that whenever it becomes essential to ascertain what has transpired before a grand jury, it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted, or what they said during their investigations, because this cannot serve any of the purposes of justice.

*U. S. v. Farrington,* 5 Fed. Rep. 343, 347.
*State v. Campbell,* 73 Kans. 688; 85 Pac. 784 (Reviewing Authorities).
*Royce v. Territory,* 5 Okla. 61; 47 Pac. 1083.
*U. S. v. Charles,* 2 Cranch C. C. 76, Fed. Cas. No. 14,786.
*U. S. v. Cooledge,* 2 Gall. 363, Fed. Cas. No. 14,858.
*Low's Case,* 4 Greenl. 439.
*Burdick v. Hunt,* 43 Ind. 381.
*Manion v. People,* 28 Ill. App. 532.
*Bressler v. People,* 117 Ill. 422, 8 N. E. 462.
*State v. Wood,* 53 N. H. 484.
*Com. v. Hill,* 11 Cush. 137.
*Com. v. Mead,* 12 Gray 167.
*Way v. Butterworth,* 106 Mass. 75.
*State v. Van Buskirk,* 59 Ind. 384.
*Com. v. Green,* 126 Pa. 531; 17 Atlantic 878, 12 Am. St. Rep. 894.
*Gordon v. Com.,* 92 Pa. 216, 37 Am. Rep. 672.
*Hindekoper v. Cotton,* 3 Watts. 56

*Doyle v. State*, 17 Ohio 222.
*People v. Haines*, 1 N. Y. Supp. 55.
*People v. Singer*, 5 N. Y. Crim. Rep. 2, 18 Abb. N. C. 96.
*People v. Shattuck*, 6 Abb. N. C. 33.
*People v. Hulbut*, 4 Denio, 133.
*State v. Benner*, 64 Me. 267.
*State v. Ivey*, 100 N. C. 539, 5 S. E. 407.
*State v. Broughton*, 7 Iredell 96 (N. C.)
*Territory v Hart*, 7 Mont. 42, 14 Pac. 768.
*State v. Will*, 97 Iowa 58, 65 N. W. 1010.
*State v. Clifford*, 86 Iowa 550, 53 N. W. 299.
*Ex parte Schmidt*, 71 Cal. 212; 12 Pac. 55.
*U. S. v. Kirkwood*, 5 Utah 123; 13 Pac. 234.
*State v. Moran*, 15 Oreg. 262; 14 Pac. 419.
*Thomas v. Com.* 2 Robinson (Va.) 795.
*Little v. Com.*, 25 Gratt. 921.
*State v. Grady*, 84 Mo. 220.
*Crocker v. State*, Meigs (19 Tenn.) 127
*People v. Lauder*, 82 Mich. 151, 46 N. W. 969 (Dissent.)
4 *Wigmore on Ev.*, Sec. 2362.
1 *Bishop, New Crim. Prac.*, Sec. 857.
*Thompson & M. Jur.*, Sec. 703.
1 *Wharton, Law of Ev.*, Sec. 601.
3 *Rice, Crim. Ev.*, p. 409.

In *U. S. V. Cooledge, supra,* before Mr. Justice Story, sitting as Circuit Justice, on a motion to quash the indictment for a statutory offense upon the ground that one of the witnesses before the grand jury had not been sworn, the court said:

"The grand jury, is the great inquest between the government and the citizen. It is of the highest importance, that this institution be preserved in its purity, and that no citizen be tried, until he has been regularly accused by the proper tribunal. Every indictment is subject to the control of the court, and this indictment, having been found irregularly, and upon the mere statement of a witness, without oath, which was not evidence, a cassetur must be entered."

In *Low's Case, supra,* in speaking of the propriety of examining into the regularity of grand jury proceedings returning an indictment for forgery, the court said:

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"* * * Is the judicial power so defective that this error must remain without correction? If so, the life of a citizen may be brought into jeopardy, in violation of both his legal and constitutional rights, under the pretense of a necessary adherence to the letter of a technical rule."

In *Com. v. Mead, supra,* it is said at page 170:

"The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be three-fold. One is that the utmost freedom of disclosure of alleged crimes and offenses by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known, it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it, before the presentment is made. * * * But when these purposes are accomplished, the necessity and expediency of retaining the seal of secrecy are at an end. * * * After the indictment is found and presented, and the accused is held to answer and the trial before the traverse jury is begun, all the facts relative to the crime charged and its prosecution are necessarily opened, and no harm can arise to the cause of public justice by no longer withholding facts material and relevant to the issue, merely because their disclosure may lead to the development of some part of the proceedings before the grand jury. On the contrary, great hardship and injustice might be occasioned by depriving a party of important evidence, essential to his defense, by forcing a rule of exclusion, having its origin and foundation in public policy, after the reasons on which this rule is based have ceased to exist."

*Doyle v. State, supra,* the court held, that an indictment should be quashed, and after pleading "not guilty" leave was granted to withdraw plea, and enter special plea that one of the grand jurors had not the qualifications of an elector; the court said:

"It should have been quashed or set aside as a nullity. But it is said the objection comes too late. No objection can come too late, which discloses the fact that a person has been put to answer a crime in a mode violating his legal and constitutional rights. * * * No person can be put upon his defense on the charge of crime, or be convicted of crime, ex-

cept in the exact mode prescribed by law. And whenever it shall be made manifest, in the progress of a criminal prosecution, that the legal rights of the person charged have been violated, the court will permit the accused to have the benefit of the error."

In *Gordon v. Com., supra,* it is said:

"On no sound principle can it be said that a witness, who has testified before a grand jury, shall be permitted to claim that his evidence was a privileged communication, so that it shall not be shown, under the direction of the court, whenever it becomes material in the administration of justice. It is material when the evidence is necessary to protect public or private rights."

*Thompson & M. Jur.,* Sec. 703, states the rule, as follows:

"But, when for the purposes of public justice, or for the protection of private rights, it becomes necessary, in a court of justice, to disclose the proceedings of the grand jury, the better authorities now hold that this may be done. It is obvious that there are certain transactions of the grand jury room which it can never be for the interests of justice to disclose; for example, what particular jurors concurred in or opposed the finding of the indictment, what opinions were expressed by the various members of the body. In respect to such matters the injunction of secrecy may well be perpetual."

*Wharton's Law of Ev.,* Sec. 601:

"It was at one time, supposed that a grand juror was required by his oath of secrecy to be silent as to what transpired in the grand jury room; but it is now held that such evidence, whenever it is material to explain what was the issue before the grand jury, or what was the testimony of a particular witness, will be required."

In *Royce v. Ter., supra,* it is said:

"The proceedings of grand juries cannot ordinarily be disclosed, but this rule is not to be carried to the extent of obstructing justice or creating wrong and hardship. A court may inquire into the evidence upon which a grand jury has found an indictment, and if such evidence is plainly illegal and incompetent, should quash the indictment."

We are aware that there are decisions which hold that the court can not or will not examine into the evidence upon which the grand jury base their indictment. Some of the leading cases so holding, cite neither authority nor precedent for their ruling. Such, for instance, is the case of *State v. Boyd*, 2 Hill 288, 27 Amer. Dec. 376 (S. C. 1834), frequently cited and relied upon as authority for refusing to examine into the evidence submitted to a grand jury. In that case the wife of the accused testified before the grand jury and it was said that the "court will in no instance inquire into the character of the testimony which has influenced the grand jury." The cases following the doctrine of *State v. Boyd, supra*, which we have examined, are, with few exceptions hereinafter noted, cases in which no evidence of the accused against himself was had before the grand jury but cases in which other grounds were urged for quashing the indictment. In other words, they do not involve the constitutional privilege of immunity from furnishing evidence against one's self. The exceptions referred to are as follows:

In *Mencheca v. State*, (Tex. Crim. App.) 28 S. W. 203, the court held, without reasoning or authority and without considering any constitutional right: "that the accused was carried before the grand jury, and there testified to facts criminative of himself, if he in fact did, cannot be made the ground of a motion to quash the indictment."

In *People v. King*, 28 Cal. 266, it was held that there was no ground for quashing the indictment where the testimony of the accused before the grand jury was voluntary.

In *State v. Donelson*, 45 La. Ann. 744, 12 So. 922, the defendants testified before the grand jury but were informed that they need not do so but that if they did testify they would have to do so fully. It was held that there was no error, the court saying: "Had the proof disclosed that the party accused, who urges complaint of the Judge's ruling, had been required by the grand jury or the Trial Judge to testify before that body, against his protest, and in opposition to his expressed desire to avail himself of his lawful and constitutional privilege, a clear case would have been made, and an indictment predicated upon such evidence would have been undoubtedly vicious."

In *Makin v. People*, 155 Ill. 312, 56 Am. Rep. 167, it was held that the testimony of the accused before the grand jury was voluntary during investigation of other matters. There was no error.

In *United States vs. Kirkwood,* 5 Utah 123, 13 Pac. 234, the accused was informed by the prosecuting attorney that he could not be compelled to testify and need not do so; he voluntarily did so, consequently there was no error or ground for quashing the indictment.

In *People vs. Lauder,* 82 Mich. 109. 46 N. W. 956, a case charging bribery, three members of the court constituting a majority held that, it not appearing that the accused claimed his privilege of exemption, he waived it and testified voluntarily and that a Plea in Abatement would not be sustained. We are satisfied that the two Judges dissenting therein were right upon principle and are supported by abundant authority as hereinbefore cited.

In *State vs. Hawks,* 56 Minn. 129, 57 N. W. 455, the court held that the indictment would not be quashed because the accused testified before the grand jury on a matter other than that upon which he was being tried; the court concluded that there was an entire failure to show that he had been compelled to be a witness against himself.

In the case at bar it is obvious, as the court below found, that the alleged confession of guilt by the plaintiff in error, Holt, which was placed before the grand jury, was involuntary. The fact that his involuntary testimony against himself was placed before the grand jury through an intermediary and was used by the grand jury in returning an indictment against him, we believe to be the same in principle as if he had been compelled to personally go before the grand jury and give the same testimony. To uphold an indictment against the plaintiff in error, Holt, is for this high court to encourage the creation of an inquisitorial body or one or more persons whose duty it shall be to wring from the unwilling lips of an accused person by promise, torture or fear, self accusations which may then be laid before the grand jury as a basis for placing such person in jeopardy. We feel that the sanction of this court should not and will not be given to the accomplishment by indirection that which it has so justly been held cannot be accomplished directly, namely, to compel an accused person to be a witness against himself before a grand jury. To do so would violate his constitutional rights.

> *Counselman vs. Hitchcock,* 142 U. S. 547, 35 L. Ed. 1110.

For as has been said by this court:

"It may be that it is the obnoxious thing in its mildest

and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

*Boyd vs. United States*, 116 U. S. 616, 29 L. Ed. 746.

As to the sufficiency of the motion to quash, we direct the attention of this court to the fact that while there is no written motion to quash or Plea in Abatement aside from the contents of the affidavit of counsel for plaintiff in error (R., 25, 26), no objection to the form or sufficiency thereof was made either by the United States District Attorney or the trial Judge. On the contrary, the ruling of the court thereon (R., 26, 27) and the decision upon the motions interposed after judgment and before sentence (R., 11), show clearly that the question of whether a confession of the plaintiff in error was extorted from him and used before the grand jury in violation of his constitutional rights was not disposed of or considered on any point of practice or of form but upon the merits as seen by the learned trial court. Which was in substance that assuming that a confession of guilt by plaintiff in error had been wrung from him and placed before the grand jury yet if such a confession were offered to the petit jury it would be excluded and the accused would, therefore, ultimately have no cause for complaint; and that:

"Only in rare instances when * * * fundamental principles of jurisprudence have been disregarded in the proceedings of the grand jury, e. g., by compelling an accused person to appear and give incriminating testimony against himself, * * * that a court will set aside an indictment for reasons not apparent on the face of the record." (R., 12.)

The learned trial court was unable to recognize this case as one of those "rare instances." Whether the trial court considered that the matter was raised by suggesting to the court that the constitutional rights of the accused had been violated or whether he considered that the affidavit or motion sufficient in form and substance either as a Plea in Abatement

or motion to quash, we believe this court will not inquire since no objection or intimation was made in the court below that it was insufficient in form; no affidavit in denial was interposed nor was any attention paid to the prayer (R. 12) that witnesses already in court be examined to prove beyond doubt the matters set out in the affidavit.

*Neal vs. Delaware*, 103 U. S. 370, 26 L. Ed. 567.

Furthermore the trial court in making his ruling (R. 26, 27) and decision (R. 11, 12) assumed the truth of the matters set forth in the affidavit but was unable to determine that the same constituted ground for quashing the indictment.

ERROR IN THE SELECTION OF THE JURY DEPRIVED THE DEFENDANT OF A TRIAL BEFORE AN IMPARTIAL JURY.

Embraced in this point is Assignment of Error numbered 11.

No. 11. The court erred in refusing to sustain defendant's challenge for cause to venireman, John Gilchrist, on the ground that said venireman had formed an opinion as to the guilt or innocence of defendant, which it would require evidence to remove.

The examination of said juror Gilchrist on his voir dire, is set out in full in the Record, but the parts thereof material to a consideration of this point are as follows:

(Examination by District Attorney, R. 20.)

Q. Did you ever hear or read about this case?
A. Yes.
Q. Ever talk with anybody about the case?
A. Well, not recently. I suppose I have passed remarks when I read the account of it.
Q. You didn't talk with anybody who purported to be a witness in the case, or who knew anything about the facts in the case of his own knowledge?
A. No.
Q. Only with people similarly situated as yourself, who read the newspapers?
A. Yes, sir.
Q. Did you form any opinion as to the guilt or innocence of James Holt?

A. Well, I took the paper's statement as though it was a fact.

Q. Did you remember at this time the facts that were stated therein?

A. Well, I could not say that I could itemize them; but as a general thing, my memory is pretty good, I think.

Q. Have you at the present time any opinion as to the guilt or innocence of the defendant?

A. Nothing more than just what the paper stated.

Q. Mr. Gilchrist, can you lay aside whatever opinion or impression you got from reading the newspaper and try this case solely upon the evidence given in this court room?

A. The evidence would change it very easily.

Q. I mean can you lay aside whatever opinion or impression you may have and decide the case solely upon the evidence given in the court room?

A. Yes, sir.

And again (R. 21), examination by counsel for defendant:

Q. Mr. Gilchrist, you said that the opinion which you formed from the newspaper was such an one as could be removed by evidence?

A. Yes, sir.

Q. Would it take some evidence to remove the opinion which you have formed?

A. Well, yes; I would not remove it now without any evidence.

Q. It would require some evidence to change the opinion which you have formed?

A. Yes, sir.

Mr. CALDWELL: I challenge him for cause.

Mr. TODD: I resist the challenge.

Examination by the Court:

Q. Mr. Gilchrist, on this trial if the evidence failed to prove the same state of facts which you read, would you decide the case according to what the newspaper published or decide it according to the evidence, or lack of evidence on the trial?

A. The evidence on the trial.

The COURT: I deny the challenge.

Mr. CALDWELL: We ask for an exception.

The COURT: Exception allowed.

Again on examination by counsel for defendant (R. 22):

Q. When you read about this case, did you talk about it with anybody?

A. Oh, several. There are two or three men around my

place all the time, and we generally pass remarks about anything.

Q. You exchanged opinions about the facts set forth?

A. Yes; just about it around there.

Q. Do you recall the opinions that were expressed? I don't want you to state them; just whether you recall the opinions.

A. We merely expressed what was in the paper, mentioned to one another what we read.

Q. Do you still believe that the statements which you saw in the paper were true?

A. Well, I don't know whether they are or not.

Q. You would require some evidence to change your belief in the matter?

A. It would require evidence; yes, sir. If there was no evidence submitted to me I would have to take what I saw in the paper.

Mr. CALDWELL: We would like to interpose a challenge for cause.

Mr. TODD: I resist the challenge.

THE COURT: The challenge is denied.

Mr. CALDWELL: We ask an exception.

The COURT: Exception allowed.

(Mr. Gilchrist was excused on defendant's peremptory challenge.)

The defendant (plaintiff in error, here) exhausted each and every one of his peremptory challenges before the jury which tried the case was finally selected and sworn. (R. 19, middle.)

Whether the refusal to allow challenge for cause to venireman John Gilchrist was error depends upon several considerations. Sec. 800, U. S. R. S., provides that jurors in the courts of the United States shall have the same qualifications as jurors of the highest court of law in the state in which the court is located. It further provides:

"And for this purpose the said courts may, by rule or order, conform the designation and impaneling of juries, in substance, to the laws and usages relating to jurors in the State courts, from time to time in force in such State."

Rule 97 of the U. S. Circuit Court for the Western District of Washington is as follows:

"Rule 97.—Impaneling and Challenging Jurors in Criminal Cases.—In all criminal trials, the designation, impaneling, and challenging of jurors shall conform to the laws of

this State, existing at the time, except as otherwise provided by acts of Congress, or the rules of this court."

Under the decision in *Pointer vs. U. S.* (1893), 151 U. S. 396, 407, 38 L. Ed. 209, 213, resort must be had to the law of the State of Washington as it existed on December 10, 1908, the day of trial, to determine whether the denial of challenge for cause to venireman John Gilchrist was prejudicial error.

In this State a venireman who has formed or expressed an opinion on the merits of the cause in which he is called, which it would require evidence to remove, is disqualified as a juror therein even though he states that he could render a verdict on the evidence adduced upon the trial without reference to his former opinion.

*Rose vs. State*, 2 Wash. 310, 26 Pac. 264.
*State vs. Murphy*, 9 Wash. 204, 37 Pac. 420.
*State vs. Wilcox*, 11 Wash. 215, 39 Pac. 386.
*State vs. Rutten*, 13 Wash. 203, 43 Pac. 30.
*State vs. Moody*, 18 Wash. 165, 51 Pac. 356.
*State vs. Lattin*, 19 Wash. 57, 52 Pac. 314.
*State vs. Stentz*, 30 Wash. 134, 70 Pac. 241.
*State vs. Riley*, 36 Wash. 441, 78 Pac. 1001.

In the *Rose* case, *supra*, the court said:

"The liberality of courts in the matter of accepting jurors who have read and heard of what purports to be the facts in a criminal case is very much greater than formerly, but they have not yet reached a point where one who states that he has an opinion which it would take evidence or strong evidence to remove, can be taken as a juror in a criminal case where the life of a prisoner is in jeopardy. By the court's ruling the defense was compelled to peremptorily challenge the juror to avoid the danger of his presence with a fixed opinion in his mind. There must have existed in the opinion of the court, notwithstanding his assertion to the contrary, a doubt whether or not he could be fair, which should have been resolved in favor of the prisoner."

And in the *Riley* case, *supra*, Judge Fullerton, speaking for a united court, says:

"If a juror has an opinion as to the guilt or innocence of the defendant in any given case, so far fixed that evidence would be required to remove it, he is disqualified as a juror

in that case, notwithstanding he may answer that he can, or believes he can, disregard such opinion, and try the case according to the law and the evidence that is given upon the trial. There are minds, doubtless, that are capable of laying aside preconceived ideas and opinions, and of arriving at conclusions from particular facts, disregarding and not considering others. But this is an attribute of mind that is acquired by special training and education, and is not an acquirement possessed by the ordinary juryman. We are of the opinion, therefore, that the appellant did not have a trial before a fair and impartial jury, such as is guaranteed to her by the constitution and laws, and that for this reason the judgment against her must be reversed, and a new trial awarded."

Under this rule the attitude of mind shown by venireman John Gilchrist rendered him an objectionable juror and the refusal to allow challenge against him for cause was error.

The position taken by the Supreme Court of this State on this question finds support in many jurisdictions. Your Honors have approved the language of the late Mr. Justice Peckham in *Crawford vs. U. S.* (1909), 212 U. S. 183, 196, 53 L. Ed. 465, 471, where he said:

"Bias or prejudice is such an illusive condition of the mind that it is most di....cult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence."

In *Vermilyea's* case (N. Y. 1826), 6 Cowen 555, 565, the court, referring to the opinion of the Great Chief Justice in Burr's trial, said:

"The reasoning of Chief Justice Marshall, on the trial of Col. Burr, vol. 1, p. 370, 419, is directly in point. He has shown in the most satisfactory manner that a juror who has given his opinion cannot be considered impartial; that the natural tendency of preconceived opinions in a juror, is to obstruct the impartial administration of justice. He asks, why a distant relative, or he who has prejudices, cannot serve on a jury? Because he is presumed to have a bias. He may declare that, notwithstanding, he has determined to listen to the evidence, and be governed by it; but the law will not trust him. The Chief Justice observed, 'is there less reason to suspect him who has prejudged the case, and deliberately formed and expressed an opinion upon it? The law suspects, and not

without reason, that he will listen with more favor to that testimony which confirms, than to that which would change his opinion. It is not to be expected that he will weigh evidence or argument, as fairly as a man whose judgment is not made up in the case.'"

In *People vs. Vermilyea* (N. Y. 1827), 7 Cowen 108, it is said:

"All the elementary writers, with the exception of Chitty, lay down the proposition broadly, that if a juror has declared his opinion beforehand, it is a good cause of challenge. (1 Archbold, 181, 182. 2 Tidd, 779, 780. Bacon, title Juries, (E. 5). Bull. N. P. 307. Hale's Com. Law, 138.)"

Whether, therefore, your Honors decide this question according to the law of the State of Washington pursuant to Rule 97 of the Trial Court, or whether you follow the rule of decision indicated in the *Crawford* case, *supra*, and in the opinion of the Great Chief Justice in Burr's trial, the result will be the same. The overruling of defendant's challenge for cause to venireman John Gilchrist was error. Was this error prejudicial?

On the refusal to allow this challenge for cause, Mr. Gilchrist was excused on defendant's peremptory challenge and before the jury, which tried the case, was finally selected, defendant had exhausted all of his peremptory challenges. (R. 19.) On this showing the error denying the challenge for cause is prejudicial and, we contend, calls for a reversal of the judgment.

*Thurman vs. State* (1889), 27 Neb. 628, 43 N. W. 404.
*Theisen vs. Johns* (1888), 72 Mich. 285, 40 N. W. 727.
*People vs. Helm* (Cal. 1907), 93 Pac. 99, 101.
*People vs. Schmitz* (Cal. 1908), 94 Pac. 407, 412.
*Shane vs. Butte Elec. R. R. Co.* (1908), 37 Mont. 599, 97 Pac. 958.
*Fitts vs. So. Pac. Co.*, 149 Cal. 310, 86 Pac. 710, 117 A. S. R. 130.
*Ruff vs. Rader*, 2 Mont. 215.

In *People vs. Helm* the court said:

"* * * the right to exercise peremptory challenges is absolute. Such a challenge may be exercised upon the mere whim or caprice of defendant. So that again we say, that any rulings of a court which compel a defendant to exhaust his

peremptory challenges and force him to accept jurors after his challenges have been so exhausted becomes the proper subject of review."

Referring to the *Helm* case, Presiding Judge Cooper, in *People vs. Schmitz, supra,* approves it in this language:

"The defendant exhausted his peremptory challenges, and it must be presumed that the removal of the jurors Harris and Bray without cause, after they had been sworn, was injurious to his rights. * * * The views here expressed are ably supported in an exhaustive opinion written by Mr. Justice Henshaw in *People vs. Helm* (Cal. Sup.), 93 Pac. 99. The case was reversed upon the rulings of the trial judge refusing to sustain defendant's challenges to certain jurors on the ground of implied bias. The court said that, if the defendant had been compelled to exhaust his peremptory challenges to relieve himself of jurors who should have been excused by the court for cause, 'the rulings of the court upon such jurors becomes a most important matter of review.' "

The same rule obtains in Michigan as laid down in *Theisen vs. Johns, supra*:

"The court should have excused him when challenged by counsel for cause. It will not do to say that this error was cured by the fact that counsel afterwards challenged the juror peremptorily, as it appears from the record that counsel upon both sides exhausted their peremptory challenges. There may have been others upon the jury whom counsel might desire to challenge peremptorily and have been unable to excuse by reason of having exhausted his challenges."

The Nebraska court lay down the same rule in *Thurman vs. State, supra*:

"Plaintiff in error exhausted all its peremptory challenges upon the trial, one of which was to the juror hereinbefore mentioned. By being compelled to dispose of this juror, upon his peremptory challenge, he was in fact limited to seven. Our statute provides no method of challenging jurors peremptorily in excess of the number provided by the section above referred to. It would be unwise, perhaps, for a party placed upon trial, charged with a crime, to make objections to jurors which must necessarily be futile, and which could have no other effect than that of, in some degree at least, prejudicing the minds of the jurors against his cause. The law does not require the performance of an unnecessary or im-

practical act. * * * A moment's reflection must satisfy the mind that this is, and must be, the correct rule."

If the trial court can deprive accused of one peremptory challenge by erroneous ruling in denying challenges for cause, he can deprive defendant of all twenty. If there is any redress for denying a peremptory challenge, it can exist only in the appellate court. There must be redress for an erroneous ruling which compels defendant to waste a peremptory challenge, because if the court had refused to allow him his full number of challenges, this court would reverse the sentence. The trial court can not do indirectly what he could not do directly. For these reasons, the denial of defendant's challenge for cause to venireman John Gilchrist was prejudicial error, for which, we contend, the judgment should be reversed and a new trial awarded.

ERROR IN REFUSING TO EXCLUDE JURY FROM COURT ROOM DURING PRESENTATION OF ARGUMENTS OF LAW AND TESTIMONY IMPROPER FOR JURY TO HEAR AND CALCULATED TO PREJUDICE THE JURY AGAINST THE DEFENDANT.

Embraced in this, are assignments of error Numbers 12, 13, 14 and 27.

12. The Court erred in refusing to exclude the jury from the court room during the argument on defendant's motion for leave to withdraw his plea of "not guilty" and interpose a plea in abatement and motion to quash the indictment.

13. The Court erred in refusing to exclude the jury from the court room during the preliminary examination of witness E. H. Porter touching the admissibility of statements alleged to have been made by defendant and during argument of counsel on the admissibility of said alleged statements.

14. The Court erred in refusing to exclude the jury from the Court Room during the preliminary examination of witness Harry W. Newton touching the admissibility of statements alleged to have been made by defendant, and during argument of counsel on the admissibility of said alleged statements.

27. The court erred in permitting the witness Harry W. Newton to testify in the presence of the jury that defendant made any statements while he was in the custody of the military officers immediately after his arrest.

On the morning of the second day of the trial below, counsel for plaintiff in error requested the Court to exclude the panel of twelve jurors which had been selected but not sworn,

that a motion might be presented and argued for leave to withdraw the plea of "not guilty" theretofore entered, "and to enter a motion in the nature of a plea in abatement, a motion to quash the indictment," the following occurred (R. 23, 24):

"The COURT: Now, I have excluded the witnesses, *but I am unwilling to exclude the jury from any part of the proceedings in this trial.* If there is any reason to be shown why this jury should not be sworn in now to try the case, I will hear what it is.

Mr. CALDWELL: If the Court will consent, I would like to state, in the presence of your honor and the district attorney, the reason which we have in asking that the jury be excluded, as well as the witnesses; and in that way, certainly no error can be committed; whereas, the other way, we feel that error will be committed if we are compelled to present this matter with the jury here.

The COURT: I have yet to learn that it is error for the court to hear *any matter* pertaining to the trial with the jury present.

Mr. CALDWELL: Our position is, that it will be error if any matter goes before the jury which is improper for them to consider, and that is the reason we desire them excluded from the room until we can decide the question of whether the matter is proper, or improper; and, of course, if it is proper, the jury are not only entitled to, but will hear the entire matter.

The COURT: If you have got anything to say I will hear you now.

Mr. CALDWELL: Only in the presence of the jury, your honor will hear it?

The COURT: I will make no order excluding the jury, they are here, and have a right to remain.

Mr. CALDWELL: May I state to your honor and the district attorney, on one side out of their hearing?

The COURT: I am unwilling to have any mystification about this trial. If there is anything that is secret and improper for the jurors to hear, it has no place in the trial. The things the jury will imagine will be *ten times more prejudicial to your client than to be out with what it is.*

Mr. CALDWELL: We are willing that everything proper should go before the jury, and what is improper that there should be no error, they should be excluded from hearing.

The COURT: Then we will have to lock this jury up all the time. You have addressed the jurors to decide the case on what is proper.

Mr. CALDWELL: The court would not permit improper evidence to go before the jury, and then leave it to them as to whether or not they should consider it, or ~~refuse~~ reject it?

THE COURT: Certainly not.

Mr. CALDWELL: That is the proposition presented by this matter.

The COURT: You can't offer any evidence until the jury will be sworn. What you say to me will not be evidence.

Mr. CALDWELL: No, but it may effect the jury if said in their presence, just the same as if some one would talk to them on the outside.

The COURT: I will retain the jury without debating any further.

Mr. CALDWELL: We ask an exception to your honor's ruling.

The COURT: Exception allowed."

Then followed, all in the presence of the jury, the presentation of said motion and the grounds therefor, and the reading of authorities to the Court in support thereof, and the ruling of the Court denying said motion. Thereupon (R. 27) the Court was requested by counsel for plaintiff in error, to discharge the jurors selected and not sworn, and draw a new panel, which request was denied, an exception allowed, and the jury was sworn. Then the District Attorney, in his opening statement (R. 27) informed the jury that the defendant had voluntarily confessed this murder, which statement was duly excepted to and is assigned elsewhere herein, as error.

Later in the trial (R. 38), Dr. E. H. Porter, one of the post surgeons at Fort Worden, and a member of the Military Board of Inquiry appointed to investigate and determine the identity of the deceased soldier and of the person or persons responsible for his death, was called as a witness for the United States, and was shown an olive drab soldier's blouse which was, during the trial, admitted in evidence as "Plaintiff's Exhibit S." He stated that the blouse was shown to the plaintiff in error, on Saturday, in the hospital (where he was being examined by the board of inquiry, consisting of his superior officers in the army).

Q. (By District Attorney). "Did he make any statements in regard to that blouse at that time, voluntarily?

Mr. CALDWELL: We object to any statements being made by the parties, as to what was said by the defendant at any time in the hospital on Saturday, or any later time, or while he was in confinement at Fort Worden after his arrest.

The COURT: Before the court admits him to repeat any statements that the defendant may have made, interrogate him fully as to the circumstances and conditions under which the statement was made. * * * (R. 39).

Mr. CALDWELL: We ask at this time that the jury be excused, until the circumstances under which any conversations were had with the defendant, are determined by the court to have been proper or improper."

The request was denied and exception allowed.

Then after examination by the Court (R. 39) the following occurred:

"The COURT: At the present time I will sustain this objection. You can renew the offer after this case has been more fully developed, so I can judge better than I can now.

Mr. CALDWELL: We are willing to cross examine the witness, if the jury retires on the matter.

The COURT: I AM NOT GOING TO SEND THE JURY OUT DURING ANY PART OF THIS TRIAL."

Later, Captain Newton, another member of the military board of inquiry which "sweated" the plaintiff in error at the Fort, prior to his indictment, was called as a witness for the United States (R. 42), and after some preliminary examination, the following occurred (R. 44):

"Q. Captain, did you have any conversation with the defendant after his arrest?

Mr. CALDWELL: We object to anything in relation to any conversation.

Mr. TODD: I am not going to call out what the conversations were at this time. I am going to have the witness tell whether there were any conversations, and the circumstances.

The COURT: I don't see how that can be material *unless the jury can infer something from the conversations.*

Mr. TODD: I am going to qualify him to put these conversations in. I am then going to offer to show what the defendant said.

The COURT: *You said the other day* that there were Supreme Court decisions which were to the effect that the Government had a right to prove such conversations.

Mr. TODD: Yes, your Honor.

The COURT: Is there anything later than the Bram case?

Mr. TODD: No, sir; nothing later than the Bram case. There have been confessions admitted—

Mr. CALDWELL: I object to the use of the word "confession" by the prosecutor. There is nothing in this case to show that defendant made a confession, and I object to it in the presence of the jury.

The COURT: Nobody said that he did make a confession.

We can't curtail the use of the English language by the prosecuting attorney. On the hearing he may express himself by words that the Court understands and that he understands.

Mr. CALDWELL: We ask, may it please the court, that the jury retire until this matter is passed upon by the court, it being a question simply for the court, and we ask that the jury retire until the matter is decided by your honor here."

The motion was denied and exception allowed. Thereupon (R. 44, 45), the District Attorney argued with the court, discussing the decisions of this Court in which he repeatedly used the words confession and admission, and the admissibility of the same, from which the jury in this case, being human and of ordinary intelligence, and being on the alert for something to bear out the opening statement of the District Attorney, to the effect that the plaintiff in error had confessed this atrocious crime, naturally made the obvious deduction that he had so confessed to this witness, and especially must he have done so or his counsel would not be so persistent in attempting to restrict the witness' testimony. The fact that the accused had a constitutional right to have the testimony excluded was probably unknown to these jurors; in fact they should not be blamed, if throughout this trial, they were ignorant of the fact that the plaintiff in error had *any* constitutional rights; nor can we impute to them the possession of that rare judicial ability to exclude from their untrained minds a deduction or a fact which it is improper for them to remember or consider.

Then followed a statement to the court, as follows (R. 45):

Mr. TODD: "* * * In the case at bar, I am satisfied, if the court will allow me to show the circumstances under which any statements were made to Captain Newton, *he will hold that the statements of Holt were wholly voluntary and entitled to admission.*

Mr. CALDWELL: We take an exception to counsel stating in the presence of the jury that any statements were made to Captain Newton after his arrest, and while held at Fort Worden, on the ground that they are calculated to prejudice and bias the jury against the defendant.

The COURT: Gentlemen of the jury, these remarks of counsel should not be understood as implying that this jury has not got fortitude enough *to resist any influence of prejudice* that *might* be created by hearing remarks that are proper to be made to the court in discussing a legal question. You should understand that all through this trial, as the court will instruct you finally, after the evidence is in, that you are to decide this case on the testimony as it comes from the witnesses on the witness stand; not by what counsel may say, not by

what I say, *not by what the newspaper publish*, or anything of that kind. I am not excluding you, because I assume that you are men of experience and common sense; that you can sift this matter and decide this case upon the testimony that the court rules and decides to be competent and admissible testimony.

The court will take a recess for a few minutes.

* * * * * *

The COURT: Whether the Government has a right to prove anything that the defendant may have said depends entirely upon the circumstances and conditions surrounding any statement he may have made. I will have to hear the preliminary testimony before I can decide as to the admissibility of any statement made by the defendant. I overrule the objection at present.

Mr. CALDWELL: We ask an exception.

The COURT: Exception allowed.

Examination by Mr. Todd:

Q. Captain, now in answering my questions be sure and not state anything that was said. These are merely preliminary questions, and I want you to state the circumstances of the different occasions. State whether or not at any time the defendant Holt made statements to you or in your presence.

* * * * * *

Mr. CALDWELL: We object to this on the ground that no preliminary foundation has been laid showing whether any statements were made. It should first be shown what circumstances were surrounding his arrest and detention. Will your honor rule upon that?

The COURT: Yes, sir; I overrule the objection.

Mr. CALDWELL: We ask an exception.

The COURT: Exception allowed.

Q. State the first time, giving the day and date and the place.

A. The first conversation I had?

Q. The first statement that the defendant made.

A. On Saturday afternoon.

Q. Where?

A. In the hospital office.

Q. Who were present?

A. Captain Abbott, Dr. Porter, and Dr.—some of the time, Dr. Harris; some of the time, Captain Reeder and Lieutenant Burt.

Q. State the next time you heard the defendant make any statement.

A. On Monday following.

Q. Where?

A. In the same place.

Q. Who was present?

A. At first there was Dr. Harris, Dr. Porter, Captain Abbott, Lieutenant Burt, and myself. Subsequent to that, when we were in the office together by ourselves.

Q. Who?

A. Private Holt and myself.

Q. At whose request?

A. At his.

Q. What did he request?

A. He simply asked—

Mr. CALDWELL: We object to any statements that were alleged to have been made by the defendant. Captain Newton was just about to say what the defendant stated to him.

Q. What did he request?

Mr. CALDWELL: He can't say that without saying what he said, and we object to any statement what the defendant said.

The COURT: I will sustain that objection for the present.

Q. How did you happen to be alone with him, if you can tell without giving what he said?

Mr. TODD: Does the court permit that question? I don't want to transgress the rules of the court; I want to show the circumstances though.

The COURT: *I think you are getting on dangerous ground.* Something more should be shown before you come to that. Let me ask a few questions."

Then followed a preliminary examination by the court and cross-examination by counsel for plaintiff in error, which brought out the fact that any statements which the plaintiff in error may have made were inadmissible as evidence against him. During the cross-examination, which established this fact, the following occurred (R. 51):

"Q. Do you remember anything that Captain Abbott said to Holt?

A. Yes, I do.

Q. What was it?

A. He asked him about his mother and his sisters and asked him about his family. Now, he says. 'Holt, if you have any regard for them, have any feeling toward them, don't you think you better tell us all about it now?' And Holt turned to him and said, 'What good would it do my mother or sisters if I did state it?'

Q. What did Captain Abbott tell him?

A. He didn't say anything.

Mr. CALDWELL: You said when you started out on this that you would not say anything said by the defendant or that you claimed was said by the defendant.

WITNESS: You asked the question; I didn't think of that.

Mr. CALDWELL: We ask that that portion of the answer be stricken out.

The COURT: It will be stricken out.

Mr. CALDWELL: And that the jury be instructed to disregard it.

The COURT: *The jury will understand;* all these questions are to fix in my mind the question as to the admissibility and the competency of the testimony that the Government wants to offer, and it has no bearing at all on the question you have to decide.

Q. (Mr. Caldwell) Was there any time, Captain, when Holt was before this board of inquiry in the office of the hospital when you were not present; that is, any time that he was there with the other members of the board than yourself?

A. I don't remember when we went to dinner Saturday night whether he went out of the office ahead of me or not. Captain Abbott and I went out together, and I don't remember now as to whether he stayed with Dr. Harris and Dr. Porter in the office. I am not positive on that, but it is my impression that he did; that he remained behind me in the office.

Mr. CALDWELL: Now, may it please the court, we would like Dr. Porter and Lieutenant Burt, who were present Saturday afternoon when the defendant was over there, provided your honor is not sufficiently advised in the premises.

Mr. TODD: Are you through with Captain Newton at the present time? If you are I would like to ask some questions.

Mr. CALDWELL: Does your honor care to hear any statements that were made to the defendant after he is alleged to have made this request on Monday morning?

The COURT: Subsequent to that?

Mr. CALDWELL: Yes, sir.

The COURT: No; that would not have any effect, any statement made to him subsequently.

Mr. CALDWELL: Well, it is subsequent merely to this preliminary conversation which the Captain was just talking about, after he came down from having his photograph taken, and his finger prints taken.

Mr. TODD: It is not preliminary to the request, is it?

Mr. CALDWELL: Yes, sir; yer, sir. No, there is nothing in here that Holt made any request. There is nothing in here that the defendant said anything.

The COURT: Were you through interrogating the captain?

Mr. CALDWELL: Yes, sir; unless your honor would permit us to examine these other witnesses before he goes further.

The COURT: No; I will have to decide on the right of the Government to make this inquiry of this witness by his state-

ment which he made here. If there is any explanation or contradiction of it, that will be a part of the defendant's case.

Mr. CALDWELL: But the point which I desireto call your honor's attention to at this time is that the defendant was in the hospital in the presence of other members of the board while Captain Newton, the witness on the stand, was not present, and that statements were made to him at that time, of which Captain Newton has disclaimed any knowledge, which were along the line of this already brought out. And they even go further. That was while he was in the presence of other members of the board, but not this witness.

The COURT: No, we will not interrupt the examination of the witness on that point, to call other witnesses as to other matters.

Mr. CALDWELL: We ask an exception.

The COURT: Exception allowed.

The COURT: Now, propound your questions in the proper way, Mr. Todd, and before it is answered I will hear a formal objection to it.

Examination by Mr. Todd:

Q. State, Captain Newton, what the request was which the defendant made?

Mr. CALDWELL: We object to the question on the ground that any statements which this defendant may have made, were made under such circumstances as violate the fifth amendment to the Constitution of the United States, which provides that he cannot be compelled to be a witness against himself. Any statements which he may have made were not voluntary, as is already shown by the statements which the captain has made.

The COURT: I will sustain the objection."

Then under the subterfuge of asking questions which were pretended to be preliminary to a matter already decided by the Court, but for the real purpose of getting before the jury, the fact that the plaintiff in error made some statements relative to this crime, which his counsel were unwilllng should go before the jury, the prosecutor proceeded, as follows:

"Mr. TODD: If the court please, let me ask a question of the captain then, prior to that request, prior to the question I did ask, preliminary to it.

The COURT: Go ahead.

Q. Do you know, Captain, what effect any remarks that you have testified Dr. Porter made, had upon the defendant?

Mr. CALDWELL: We object to that on the ground that it is impossible for any third person to tell what effect any statement would have upon the mind of another person.

The COURT: That objection is sustained.

Mr. TODD: *If the defendant said those remarks had no*

*effect upon him, it would certainly be good evidence that they didn't.*

The COURT: In the Bram case the Supreme Court says it is impossible to tell the effect on the human mind of conditions of a man under arrest and accused of crime.

Mr. TODD: In the Bram case the defendant was stripped, and in a foreign country, and he was compelled to answer questions. That is what the Supreme Court said the effect of it was, of asking him questions when he was in that position; that it was the effect of coercion. *In the case at bar the defendant made the request, and was with the captain alone, and made statements to him alone, freely and voluntarily.*

Mr. CALDWELL: We except to the language of counsel as not being based upon a fact, as shown by the foundation already laid.

Mr. TODD: The Bram case is the only case in the Supreme Court of the United States where a *confession* was barred that I have been able to find.

The COURT: But it is a distinct declaration of that Court, sufficient ground to reverse a conviction by a jury, because the court admitted something that was said which was not a *confession*, but was something that was used to prejudice.

Mr. TODD: That was in answer to questions that were asked him. In this case the defendant asked the questions; he asked those questions voluntarily.

Mr. RIDDELL: We object.

The COURT: The ground that the court excludes this question on is, that there had been such a course of examination as to raise a presumption that the defendant may have been influenced by it in such a way: *that whatever he said* was extorted from him rather than being a *free and voluntary statement that he made.* In the Hardy case there was a case where the defendant himself persisted, insisted, and persisted in making a statement after he had been warned not to talk, and he was informed that he would have an opportunity at the right time to make any statement that he wanted to.

Mr. TODD: That was that Alaska case, I believe.

The COURT: Yes.

Mr. TODD: That is a case since the Bram case. *But in this case I asekd the last question for the purpose of showing that none of that did have any influence, and that was not the reason which induced him to make the statements.*

The COURT: I sustain the objection. The practice in this court has been to adhere to the rule announced in the Wilson case; that the circumstances and conditions were to be proved, and then it was for the jury to judge of the weight and value of any statement that was made. But in the Bram case the Supreme Court take the ground distinctly that it is reversible

error to allow statements to be introduced which were made by the accused person after he was under arrest, and with officers that had custody of him, and were examining him and interrogating him for the purpose of forcing some statement from him that would give light on the case. In that case the Supreme Court said that it is impossible to determine the effect on the human mind of a person being placed in that situation, and it is considered that under those conditions anything that he might have said was in the nature of an involuntary statement, and put him on the defensive.

Mr. TODD: Will the court permit me to say something further?

The COURT: Mr. Todd, I am willing to hear you.

Mr. TODD: In the Bram case the parties were putting interrogatories to him. *In this case I propose to show it was not in answer to interrogatories, but what the defendant voluntarily said himself upon his own request. I will further show that he was wholly uninfluenced by anything that Dr. Porter or anybody else said to him. It is a case entirely different from the Bram case.*

* * * * * *

The COURT: I feel obliged by the decision in the Bram case to exclude everything that may have been said, or suggested, by the defendant during the time that he was under the influence of the *searching examination* that was made of him.

Then for the obvious purpose of prejudicing the defendant in the eyes of the jury, the prosecutor persisted in asking questions relative to statements alleged to have been made by the accused, well knowing, that under the ruling of the court, the same could not be answered but that it would be necessary for the accused, through his counsel, to appear further in the light of attempting to conceal; the following occurred (R. 55):

Mr. TODD: I would like to ask this question—Captain, you need not answer until counsel has an opportunity to object to it:

Q. Did Holt at that time make any voluntary statement in regard to this blouse.

Mr. CALDWELL: We object to it.

The COURT: Objection sustained.

Q. Was that badge there at this time?

Mr. CALDWELL: At what time?

Q. (Mr. Todd). Saturday afternoon when the blouse was tried on.

A. Yes, sir.

Q. Was it shown to him?

A. Yes, sir.

Q. I will ask you if he made any voluntary statement in regard to that.

Mr. CALDWELL: That is objected to.

The COURT: Objection sustained.

Mr. RIDDELL: The court ruled on this several times, and the prosecutor is trying to get before the jury the fact that he was asked something.

The COURT: There is no use to make a speech; I have ruled.

Mr. RIDDELL: I have objected.

Mr. TODD: If the court please, I have tried this case fairly, I think, and I am not entitled to those remarks.

The COURT: I don't think so.

Mr. TODD: You may take the witness.

The COURT: I don't think there is any occasion for counsel on either side lecturing or scolding his adversary.

Mr. CALDWELL: At this time we desire to ask, without in any manner reflecting upon the jury, that the jury be discharged, on the ground that statements have been made in their presence which were not proper evidence and which were calculated to prejudice them against the defendant, and were highly improper.

The COURT: The motion is denied.

Mr. CALDWELL: We ask an exception.

The COURT: Exception allowed.

Mr. TODD: The Government rests.

The plaintiff in error contends that the foregoing proceedings show that he was denied a fair and impartial trial. The most objectionable part of the proceeding, and that most prejudicial to the plaintiff in error, is covered by the examination and cross-examination of Captain Newton. The testimony of Captain Newton is set out in the record in full (R. 42-55). At the conclusion of his testimony the Government rested.

The Record shows that the plaintiff in error repeatedly requested that the jury be excluded during the preliminary examination of Capt. Newton; that he repeatedly objected and excepted during said xamination, and at the conclusion thereof (R. 55) requested that the jury be discharged on account of the prejudice created by these proceedings.

The court will further observe that during this examination the trial court only attempted, in two instances, to prevent the proceedings from influencing the jurors. The first, at the bottom of page 45 of the Record, when, instead of instructing the jury absolutely to disregard the statements of a prejudicial nature which had been made in their presence (assuming that they could disregard the same) the court simply informed the jury that the remarks of counsel should not be

taken as an insinuation that the jury did not have fortitude enough to resist any improper influence that "might" be created by hearing the remarks of the witnesses, counsel and the court. Such an instruction was calculated more to injure than to benefit the defendant.

Again, at the middle of page 51 of the Record, in response to a specific request that the jury be instructed to disregard a damaging statement made by the witness, the court replied to counsel that the jury would understand, and then informed the jury merely that this testimony had no bearing upon the question which they would have to decide.

From a review of the authorities, and according to the most recent as well as the best reasoned ones, we believe that the better practice is, and impartial justice demands, that the jury should be retired during the preliminary examination to determine the admissibility of a confession, and during the argument addressed to the court which necessarily assumes and comments upon the existence of a confession of guilt by the accused. If the confession is inadmissible the minds of the jurors are not influenced; if it is held to be admissible, all of the evidence which has been submitted to the court, which either of the parties desires, as well as the confession, can then be submitted to the jury.

*Carter v. State*, 37 Tex. 372 (1872).
*Ellis v. State*, 65 Miss. 44, 3 So. 188. (1887).
*Draughn v. State*, ..... Miss. ..... 25 So. 153 (1899).
*Corley v. State*, 50 Ark. ....., 7 S. W. 255 (1888).
*Hall v. State*, 65 Ga. 37 (1880).
*Woolfolk v. State*, 81 Ga. 551, 8 S. E. 724 (1889).
*Kirk v. Territory*, 10 Okla. 46, 60 Pac. 797 (1900).
*State v. Vey*, ..... S. Dak. ....., 114 N. W. 719 (1908).
*State v. Williams*, ..... Nev. ....., 102 Pac. 974 (1909).
*State v. Allison*, ..... S. Dak. ....., 124 N. W. 747 (1910).
*Wigmore Evidence*, Secs. 861, 1451, 1808.

In a recent elaborate note entitled "When a Confession is Voluntary," in 18 L. R. A. (N. S.) 768-874, the writer thereof, under heading III (a), at page 777, says that the preliminary question of whether a confession is voluntary is for the court to pass upon, adding: "This is a question of considerable importance in practice, especially to the accused, who is anxious to keep his incriminating statements from reaching the ears of the jurors, who will not be likely to draw the fine distinctions the courts have often drawn, nor to act with the same tender care of the rights of the accused which a judge,

with his knowledge of the history and veneration for the precedents of the English criminal law, might be expected to act. For this reason the cases on this question are here mentioned, although it is but a matter of practice which might strictly be excluded from the note."

After citing and reviewing a hundred odd cases, only three of which are cited by the plaintiff in error herein in support of the last preceding proposition, the writer states on page 73: "It would seem from a review of the foregoing cases, that the preliminary question whether a confession is voluntary should be decided by the court, and that if, on undisputed evidence, it appears to have been involuntary, or if the court is in doubt about it, the confession ought to be excluded; that all the evidence on the question for the prosecution or defense should be heard before the court passes upon it, *and that this should be heard in the absence of the jury.*"

In *Ellis vs. State, supra*, in reversing a case in a trial for Arson, the court said:

"When it is proposed to introduce in evidence a confession of the accused against himself, the court should, upon a preliminary investigation conducted out of the presence and hearing of the jury, if requested by the defendant, to determine whether it is competent or not. If satisfied, after hearing all the testimony pertinent to the inquiry, that the confession is admissible, it should go to the jury; but unless it plainly appears that it was free and voluntary, * * * it should be excluded from the jury. * * * After a confession has been admitted by the court, either party has a right to produce before the jury the same evidence which was submitted to the court when it was called upon to decide the question of competency, and all other facts and circumstances relevant to the confession, or affecting its weight or credit as evidence."

In *Hall vs. State, supra*, in which the facts more nearly approximate those in the case at bar than any which we have found, the court said:

"It is true that the presiding judge refused to allow the confessions which these witnesses swore that the prisoner had made, to be repeated to the jury, yet every member of it knew that a confession in this connection meant the acknowledgement of the crime, and open declaration of his guilt. It is the unanimous judgment of this bench that when such preliminary examinations as this are to be had, that the better practice is, and impartial justice demands it, that the jury

should be retired from the box whilst the admissibility of the evidence is considered by the court. When he has ruled upon it, let the jurors be brought in, and the cause proceed with such further rights as the law gives to the prisoner upon his confessions. His Honor, Judge Simmons, did that which is usual and customary; he properly refused to allow the testimony, held it illegal and inadmissible, but how vain a thing it was for those jurors to seek to efface from their memories the pregnant words of these two witnesses, who swore that he had made confessions, though the words thereof were withheld from them. And if at any time the verdict 'in even balance hung,' back came, unbidden, the words, he has confessed it all, and cast the beam against the prisoner upon that which the judge had vainly endeavored to exclude. To let this verdict stand, therefore, would be not only a violation of the rights of the accused, but would be permitting the conduct of the parties, having him in charge to pass unrebuked, whilst we regret to say that it meets with our most unqualified condemnation."

In the preceding case it was the action of Judge Simmons, of the trial court, which met with the "unqualified condemnation" of the appellate court. It is interesting, therefore, to note that in the later case of *Woolfolk v. State, supra*, the opinion is by Simmons, J., and the court designates as obiter, the decision in *Hall v. State*, and says that the better practice is to leave it in "the discretion of the court, either in a civil or criminal case, whether the jury shall be sent out so that they may not hear certain preliminary testimony, * * * and we will not control that discretion, unless its exercise is abused, and it was not abused in this case."

In this latter case the jury was excluded during the preliminary examination. In this same case of *Woolfolk vs. State*, we believe the learned judge recognizes in apt language, the principle underlying the decision in the *Hall* case by saying, when ruling upon error of court, as alleged by appellant, in not putting its seal of disapproval upon, and punishing to the extent of the law, the persons making hostile demonstrations in the audience in the court room:

"All the jurors made affidavit that these things had no influence upon their minds; * * * . But can any man say with certainty that such things have no influence upon him? Can any of us say, even in this court, that this or that piece of testimony, or this or that argument of counsel, has not influenced our minds? * * * Our minds are so constituted that it is impossible to say what impression scenes of this

kind would make upon us, unless we had determined beforehand that the prisoner was guilty or innocent. The question here is not what effect these things did have upon the minds of the jury, but what effect they were calculated to produce. We cannot determine what effect they did have, but it is apparent what effect they were calculated to have."

We have found no later Georgia cases in which any judge exercised his discretion by having the preliminary examination in the presence of the jury in a case where it was then necessary to exclude the confession.

The adjudications upon this point are relatively few; some, however, hold that whether the jury shall be excluded, is a matter within the discretion of the court and the ruling will not be ground for reversal unless the discretion is abused.

In *Moore vs. State*, 36 Ala. 211; *Fletcher vs. State*, 90 Ga. 468, 17 S. E. 100; *Le Fevre vs. State*, 50 Ohio St. 584, 35 N. E. 52; *State vs. Stibbens*, 188 Mo. 387, 87 S. W.460; *People vs. Kent*, 83 N. Y. Suppl. 948; *People vs. Brasch*, 193, N. Y. 46, 85 N. E. 809; *People vs. Randazzio*, 194 N. Y. 147, 87 N. E. 112, it was held to be within the discretion of the trial court and that there was no abuse of such discretion in conducting the preliminary examination in the presence of the jury, for the reason that the confession was held to be admissible, and obviously no prejudice was caused by the jury hearing the preliminary examination.

In *Woolfolk vs. State, supra; State vs. Moore*, 104 N. C. 743, 10 S. E. 183; *Le Fevre vs. State*, 50 Ohio St. 584, 35 N. E. 52, the jury was in fact excluded during the preliminary examination and there was no abuse of discretion.

In *State vs. Kelley*, 28 Oreg. 225, 42 Pac. 217, the court was unable to find reversible error, although the preliminary examination was had in the presence of the jury and the confession then excluded. The court, however, recognized that, "cases may arise it is true in which the ends of justice might be best subserved by conducting the examination without the hearing of the jury * * * ."

In *State vs. Wright*, 48 La. Ann. 1488, 21 So. 85, a witness for the State was asked whether defendant had made a confession, and before objection could be made, he answered "Yes"; preliminary examination was then had to determine the admissibility of the confession and the jury was not directed to retire, as requested; the confession was excluded.

The court held that the damaging answer "Yes" having been made before objection could be made, that all there remained to be done was what the judge did do,—instruct the jury to disregard the statement of the witness. The court added, however: "It was proper that the jury should have been directed to retire during the progress of this investigation, as it was a matter for the ear of the court alone; but, in view of the result, we cannot perceive how any injury was done the defendant."

In *Corley vs. State, Supra,* the court said: "If the confession is fairly traceable to the prohibited influence used to extract it, it must be excluded. *Love vs. State,* 22 Ark. 336. The defendant objected to the introduction of the confession in this case; the jury was withdrawn, and the court heard the evidence, that led to the confession, to determine whether it was admissible in evidence. *This was the approved practice.*"

In *State vs. Wood,* 53 N. H. 484, the court held that argument against admissibility of evidence for defendant, by the prosecutor who termed a dying declaration a "put-up-job" for the defendant, was no error for the reason that the trial court admitted the evidence, thus holding against the contention of the prosecutor that it was a "put-up-job."

In the case at bar, whether this court holds that impartial justice demands that a jury be excluded during the preliminary examination as to the admissibility of a confession, or whether it holds that it is a matter within the discretion of the trial court, we believe the result will be the same. This conclusion is based upon the record wherein it shows that at the outset of the trial (R. 23) the learned trial court stated that he was unwilling to exclude the jury from any part of the proceedings in this trial, and further (R. 24), that he had yet to learn that it was error for the court to hear *any matter* pertaining to the trial with the jury present. And again (R. 39 at bottom), he stated that he was not going to send the jury out during any part of the trial. This record, therefore, shows conclusively that the learned trial court declined to exercise any discretion in the matter, but ruled arbitrarily at the outset, and adhered to this throughout the trial. If the court holds, therefore, that this was a matter within the discretion of the trial court, there can, nevertheless, be no doubt but that the trial court failed and refused to exercise any discretion.

Having found no adjudications on this point in the decisions of this court, we believe that the matter will be decided here upon principle, rather than upon what other subordinate

courts have held. The correct principle, we believe, is expressed in the following cases, from which we quote briefly:

In *State vs. Vey, supra,* the court said:

"Unless it is unavoidable, testimony relating to an alleged confession should never be heard by the jury before its admissibility has been determined. Of course, if the alleged confession be found to be admissible, failure to exclude the jury during the preliminary inquiry touching its competency will not be reversible error, as the circumstances leading up to and attending a competent confession are to be considered by the jury in determining its weight as evidence. If, however, after such inquiry has proceeded with the jury present, the alleged confession be found to be inadmissible, it is extremely doubtful whether the effect of the preliminary inquiry can ever be so far removed from the minds of the jurors as to insure a fair and impartial trial. It is therefore in the interest of the State rather than of the defendant that the preliminary inquiry shall proceed in the absence of the jury, and the court should so direct, whether requested or not by either party." Reiterated in *State vs. Allison* (S. D. 1910) 124 N. W. 147.

In *State vs. Williams, supra,* the court said:

"If it cannot be easily shown that the conversation sought to be proved was voluntary without leading the jury to surmise that a confession had been made it would be better to excuse the jury until the court could hear the evidence and determine whether the confession ought to be submitted to them, and then if the court believed the confession was voluntary, but that the evidence relating to voluntariness was so conflicting as to leave a serious doubt as to whether the confession was voluntary, it would not be improper for the court in its discretion to allow all this evidence to go before the jury for the benefit of the defendant, and for the jury to consider in determining the weight to be given to the confession."

In *Kirk vs. Territory, supra,* the court said:

"It is a well settled rule of law that the question of the competency of confessions is one for the court, and should be determined preliminarily to allowing the confession to go to the jury. The authorities are not harmonious upon the practice. We think the correct practice, and the one sustained by sound reason and weight of authority, is that when testimony is offered to prove a confession, and objection is made

to the competency of the evidence, the court should withdraw the jury, and hear all the evidence offered on the objection, both for and against the competency, and decide the question in the absence of the jury. If the court holds the confessions are not proper to be shown, then no prejudice can result from such action."

In *Carter vs. State, supra,* the court said:

"Whether evidence is competent to be admitted on the trial of a cause is a question of law which must be determined by the court; and, if it can be possibly avoided, evidence which it is probable may be ruled out, or which is in fact ruled out, should not be heard by or discussed in the prsence of the jury."

In the case at bar the learned trial court, in denying a motion for a new trial, gave as his reasons therefor, the following:

(R. 16.) "The alleged irregularities in the trial of the case consist of * * * the refusal of the court to exclude the jury from the courtroom, when requested to do so by defendant's counsel, in order to permit them to present motions and argue questions of law without the presence and hearing of the jurors. There was no departure from the practice of this court, which has been uniform during the period of nineteen years since it was organized, and although different from the practice in some other courts, nevertheless I am fully convinced that no legal or prejudicial error was committed. * * * I deny that in order to be fair towards an accused person, whether he be in fact guilty or innocent, it is necessary or proper * * * to continually insult their intelligence by excluding them from the hearing of any motion or argument which it is proper for the presiding judge to hear on a mere supposition that prejudice may be germinated in their minds by hearing the contentions of counsel and the rulings of the court. * * * This expression of ideas may shock fogyism, but I believe that it will meet with the approval of conservative believers in the virtue of the jury system, and that it accords with sound principles of jurisprudence. Holding these views, I cannot convict the court of any irregularities entitling the defendant to a new trial."

The trial court errs in stating the extent of the alleged irregularities. The plaintiff in error was prevented from having a fair trial principally through the act of the court in refusing to exclude the jury during the preliminary exam-

ination relative to the admission of the alleged confession, and while the district attorney and the court were arguing the law, as contained in former decisions of this court relative to the admissibility of confessions. We believe that it is not an insult to the intelligence of any jurors to accuse them of being human. The court recognized that the jury in this case was susceptible of being improperly influenced, and that juries do sometimes arrive at conclusions by considering matters improper for them to hear; this appears from the language of the trial court in several instances. At the middle of page 24 of the Record, the court said, in refusing to exclude the jury:

"The things the jury will imagine will be ten times more prejudicial to your client than to be out with what it is."

We agree with this sentiment, and are convinced that it would have been less prejudicial to the plaintiff in error to have admitted the improper testimony of Captain Newton as to the alleged confession than to have resisted its admission for more than two hours in the presence of the jury, during which time, if they possessed any intelligence, they were bound to conclude from the proceedings, as set out in the Record, that the witness would testify that the plaintiff in error had confessed his guilt of this murder. We do not believe, however, that a district attorney, with the acquiescence or assistance of the court can, by such procedure, accomplish by indirection what the constitution and the law prevent him from doing directly. Again, near the top of page 44 of the Record, the court said, in passing upon an objection to Captain Newton's testifying relative to any conversation with the plaintiff in error:

"I don't see how that can be material *unless the jury can infer something from the conversations.*"

And, at the middle of page 47 of the Record, the court said to the district attorney: "I think you are getting on *dangerous ground.*"

What was the "dangerous ground" referred to by the court if, as indicated by the ruling of the court, in his opinion denying the motion for a new trial, the jurors can be entrusted to consider only such matter as a court, after due deliberation would consider? How could there be any dangerous ground, and why could not the district attorney, as he in fact did in this case, say whatever he chose in the presence and hearing of the jury? Under the theory followed by the court in the

trial of this case no conviction would ever be reversed, no matter how far outside of the record a prosecuting attorney might travel, or what influences were brought to bear upon jurors in the trial of the case. This case was called for trial in the court below on December 10, 1908. After consuming the whole of that day in selecting the jury, they were sworn to try the case on the morning of December 11, and retired to consider their verdict on December 21st. The verdict was returned on December 22nd (R. 66). The conviction was had solely upon circumstantial evidence (R. 58), aside from improper influence, as shown by the assignments of error.

We believe that no court can say that some of the jurors, at least, did not find sufficient corroboration to the circumstances shown, in the alleged fact that the defendant had confessed his guilt of this crime. The district attorney, a quasi-judicial officer, had stated to them when their minds were presumably free from impression as to the merits of the case, that the defendant himself had admitted the ultimate fact which they were to try, viz: his guilt. This, followed by the effort of the district attorney for more than two hours, and even after the court had ruled against him, to substantiate his statement that the defendant had confessed, coupled with the strenuous objection by counsel for the defendant to the admission of this testimony which, presumably, would have borne out the contention of the prosecutor, otherwise they would not have opposed its admission, could not help but convince the jury that if the testimony had been admitted it would have shown the accused to be guilty. If the rights and privileges of the accused can be circumvented in this fashion a trial by jury is a farce, and both time and expense could be saved by having the court, after hearing all matters regardless of rules of evidence, pronounce the defendant guilty and sentence him accordingly. While the learned trial court states (R. 16), in justification of the course pursued, that there was no departure from the practice of his court which had been uniform during the period of nineteen years since it was organized, he did not, however, state that this was the first murder case that had ever been tried before him, or in his court. That different rules should and do apply in the trial of a capital case from those followed in civil and other cases requires no argument, or citation of authorities. We believe that the course pursued will not only "shock fogyism," as intimated by the trial court, but will shock the ideas of those who believe that in a capital case at least the jury should be kept free from all possibility of improper influence, and that any attempt, whether intentional or otherwise, to poison their minds against the accused should, if consummated, require

that the jury be discharged, and that his case be submitted to twelve other men in whose presence no improper or prejudicial statements had been made, or improper influences exerted.

## MISCONDUCT OF UNITED STATES DISTRICT ATTORNEY.

This point covers assignments of error Number 15, 16, 17, 28 and 29. (R. 76, 77, 78.)

Fifteen. The United States attorney stated to the jury in his opening statement that the defendant had confessed the crime for which he was then on trial.

Sixteen. The court erred in refusing to instruct the jury to disregard the statement of the United States attorney, made during his opening statement to the jury, that the defendant had confessed he crime for which he was then on trial.

Seventeen. The United States attorney stated in the presence of the jury, while arguing the admissibility of the statements alleged to have been made by the defendant, that the defendant had confessed the crime for which he was then on trial.

Twenty-eight. The United States attorney, in the presence of the jury and after the court had excluded the testimony of witness Harry W. Newton as to alleged statements made by the defendant, on the ground that they were made under duress, stated that the alleged statements made by defendant while in the custody of the military officials were voluntary, and the prosecutor continued to argue with the court the admissibility of said alleged statements by the defendant.

Twenty-nine. The court erred in permitting the United States attorney, in the presence of the jury and after the court had held inadmissible the alleged statements by defendant while in the custody of the military officials, to continue to state that said alleged statements were voluntarily made, and to continue to argue the admissibility of said alleged statements. (R. 76, 77, 78.)

Upon the jury being sworn to try the plaintiff in error, the following occurred (R. 27):

"During the opening statement of the prosecutor to the jury, prosecutor stated that on the day when the body of the deceased was found the defendant was held by the military officers of the fort, and that while so held he (Holt) was taken over to the hospital, his coat with the soot marks on it were shown to him, and he voluntarily admits that that is his coat.

His gunner's badge is shown to him, and he admits that is his gunner's badge, the badge found upon the blue blouse all burned together in the furnace. But he denies at that time knowing anything about the crime. That was Saturday afternoon. On Monday morning, while he was over in the hospital having his photograph taken and finger prints taken, he says to Captain Newton, 'Captain, there is something I would like to say to you alone.' ''

MR. CALDWELL: May it please the court, we object to the introduction of any statements here as to what the defendant Holt had said after he was arrested, on the ground that while they can be explained we should not be put to the trouble, time, and the burden of explaining them, or disproving them, as the case may be.

MR. TODD: These are voluntary confessions. I am perfectly willing to omit them till the proper time comes, if counsel objects to them at this time. Therefore, gentlemen of the jury, I will not relate to you at this time anything that Holt said afterwards, voluntarily or otherwise.

MR. CALDWELL: We except to the language of the prosecutor in stating that Holt made any confessions.

THE COURT: I didn't hear him say that he did.

MR. TODD: Take your exception.

THE COURT: You may have your exception.

(There was no evidence admitted that defendant made any confession or confessions.)

While no evidence was admitted, that the plaintiff in error made a confession of this crime, the Record shows (R. 42-55) that the plaintiff in error was compelled in the presence of the jury to resist the introduction of the testimony of Captain Newton which the prosecutor stated, also in the presence of the jury, would, if admitted, show that the accused had confessed his guilt. This is discussed elsewhere herein as an error by the court in refusing to exclude the jury to prevent such statements, not substantiated by any evidence, being made in the presence and hearing of the jury.

That the district attorney knew or had reason to know, when making his opening statement, is evident from the question propounded by him to the jurors upon their examination on voir dire as follows (R. 23):

"Q. Have you any scruples against capital punishment where the evidence is circumstantial?"

Upon the juror answering in the affirmative he was challenged for cause by the prosecutor over the objection of the plaintiff in error. Aside from this, it would be the duty of the prosecuting officer to know the competency of the evidence which he was going to offer before undertaking to poison the minds of the jurors at the outset of the case by telling them that the man on trial had admitted the ultimate fact which they were sworn to try.

The following excerpts from the record show how the prosecuting officer followed up his opening statement and accomplished, indirectly, and without testimony, the very thing which the law prohibited him from doing through the aid of testimony.

(R. 44.) "Q. Captain, did you have any conversation with the defendant after his arrest?

MR. CALDWELL: We object to anything in relation to any conversation.

MR. TODD: I am not going to call out what the conversations were at this time. I am going to have the witness tell whether there were any conversations, and the circumstances.

THE COURT: I don't see how that can be material unless the jury can infer something from the conversations.

MR. TODD: I am going to qualify him to put these conversations in. I am then going to offer to show what the defendant said.

THE COURT: You said the other day that there were Supreme Court decisions which were to the effect that the Government had a right to prove such conversations.

MR. TODD: Yes, your honor.

THE COURT: Is there anything later than the Bram case?

MR. TODD: No, sir; nothing later than the Bram case. There have been ~~conversations~~ admitted——

MR. CALDWELL: I object to the use of the word "confession" by the prosecutor. There is nothing in this case to show that defendant made a confession, and I object to it in the presence of the jury.

THE COURT: Nobody said that he did make a confession. We can't curtail the use of the English language by the prosecuting attorney. On the hearing he may express himself by words that the court understands and that he understands.

MR. CALDWELL: We ask, may it please the court, that the jury retire until this matter is passed upon by the court, it being a question simply for the court, and we ask that the jury retire until the matter is decided by your honor here.

* * * *

(R. 45.) MR. TODD: In the case at bar, I am satisfied.

if the court will allow me to show the circumstances under which any statements were made to Captain Newton, he will hold that the statements of Holt were wholly voluntary and entitled to admission.

(R. 53.) Q. Do you know, Captain, what effect any remarks that you have testified Dr. Porter made, had upon the defendant?

MR. CALDWELL: We object to that on the ground that it is impossible for any third person to tell what effect any statement would have upon the mind of another person.

THE COURT: That objection is sustained.

MR. TODD: If the defendant said those remarks had no effect upon him, it would certainly be good evidence that they didn't.

THE COURT: In the Bram case the Supreme Court says it is impossible to tell the effect on the human mind of conditions of a man under arrest and accused of crime.

MR. TODD: In the Bram case the defendant was stripped, and in a foreign country, and he was compelled to answer questions. That is what the Supreme Court said the effect of it was, of asking him questions when he was in that position; that it was the effect of coercion. In the case at bar the defendant made the request, and was with the captain alone, and made statements to him alone, freely and voluntarily.

MR. CALDWELL: We except to the language of counsel as not being based upon a fact, as shown by the foundation already laid.

(R. 55.) MR. TODD: I would like to ask this question—Captain, you need not answer until counsel has an opportunity to object to it.

Q. Did Holt at that time make any voluntary statement in regard to this blouse?

MR. CALDWELL: We object to it.

THE COURT: Objection subtained.

Q. Was that badge there at this time?

MR. CALDWELL: At what time?

Q. (MR. TODD): Saturday afternoon when the blouse was tried on.

A. Yes, sir.

Q. Was it shown to him?

A. Yes, sir.

Q. I will ask you if he made any voluntary statement in regard to that?

MR. CALDWELL: That is objected to.

THE COURT: Objection sustained.

MR. RIDDELL: The court ruled on this several times, and the prosecutor is trying to get before the jury the fact that he was asked something.

THE COURT: There is no use to make a speech; I have ruled.

MR. RIDDELL: I have objected.

MR. TODD: If the court please, I have tried this case fairly, I think, and I am not entitled to those remarks.

THE COURT: I don't think so.

MR TODD: You may take the witness.

THE COURT: I don't think there is any occasion for counsel on either side lecturing or scolding his adversary.

MR. CALDWELL: At this time we desire to ask without in any manner reflecting upon the jury, that the jury be discharged, on the ground that statements have been made in their presence which were not proper evidence and which were calculatd to prejudice them against the defendant, and were highly improper.

THE COURT: The motion is denied.

MR. CALDWELL: We ask an exception.

THE COURT: Exception allowed.

That the district attorney was permitted to use unfair and unjust means to procure a conviction in this case, warranting a reversal, we believe is borne out by the following authorities:

12 Cyc. 571.

*People vs. Wells*, 100 Cal. 459, 34 Pac. 1078.

*Newby vs. People*, 28 Colo. 16, 62 Pac. 1035.

*Holder vs. State*, 58 Ark. 473, 25 S. W. 279.

*Tucker vs. Henniker*, 41 N. H. 317.

*People vs. Shanley*, 49 N. Y. App. Div. 63, 3 N. Y. Sup. 449, 454.

*People vs. Milks*, 55 N. Y. App. Div., 384, 66 N. Y. Sup. 889.

*Hardtke vs. State*, 67 Wis. 552, 30 N. Y. 723.

*Sasse vs. State*, 68 Wis. 530, 32 N. W. 849.

*Wyatt vs. State* (Texas, Jan. 26, 1910), 124 S. W., 929, 930.

*Hall vs. U. S.*, 150 U. S. 76, 37 L. Ed. 1003.

*Graves vs. U. S.*, 150 U. S. 118, 37 L. Ed. 1021.

In *Holder vs. State, supra*, the court said in holding that an instruction to the jury did not remove the prejudice created by the action of the prosecutor:

"The action of the attorney for the state was highly rep-

rehensible. A prosecuting attorney is a public officer, 'acting in a quisi judicial capacity.' It is his duty to use all fair, honorable, reasonable and lawful means to secure a conviction * * *. He should see that they have a fair and impartial trial and avoid conviction contrary to law. Nothing should tempt him to appeal to prejudices to ~~prevent~~ the testimony or make statements to the jury which, whether true or not have not been proved. * * * To convict and punish a person through the influence of prejudice and caprice is as pernicious in its consequences as the escape of a guilty man. The forms of law should never be prostituted to such a purpose."

And in *People vs. Wells, supra,* a question was asked as in the case at bar preceded by the statement: "do not answer it until counsel has an opportunity to object." The court said:

"Objection was made by appellant, and, of course, sustained. There was not the slightest excuse for asking this question. In fact, there was injected into it an apology for asking it. What then, was its purpose? Clearly to take an unfair advantage of appellant by intimating to the jury something that was either not true, or not capable of being proven in the manner attempted. And the wrong was not remedied because the court sustained an objection to the question. Counsel undoubtedly knew beforehand that the objection would be sustained. * * * But when the prosecuting attorney asks a defendant questions which he knows, and every judge and lawyer knows, to be wholly inadmissible and wrong, and where the questions are asked without the expectations of answers, and where the clear purpose is to prejudice the jury against the defendant in a vital matter by the mere asking of the questions, then a judgment against the defendant will be reversed, although objection to the questions were sustained; unless it appears that the questions could not have influenced the verdict."

As said by the court in *Tucker vs. Hennicker, supra,* in speaking of improper statements by counsel in the presence of the jury:

"It is unreasonable to believe the jury will entirely disregard them. They may struggle to disregard them; they may think they have done so, and still be led involuntarily to shape their verdict under their influence."

In *People vs. Milks, supra,* the court said:

" * * * if a prosecuting officer in opening a case to the jury makes a statement of facts, which are irrelevant, incompetent and inadmissible, and clearly prejudicial to the defendant and which are duly objected to and an exception taken, it will constitute reversible error, unless the court by appropriate language instructs the jury that such a statement of facts should be disregarded by them and that such alleged facts ought not to be permitted to influence their verdict, and unless it clearly appears that such improper statement did not injuriously affect the defendant's rights and that an offer to prove such facts, subsequently made during the progress of the trial, will not cure such error."

In *Sasse vs. State, supra,* in a murder trial in which the prosecutor during his opening statement had referred to other crimes alleged to have been committed by the defendant, and which the court finally instructed the jury to disregard, the court said:

"These remarks of the district attorney, so grossly improper, unprofessional and unjust and so repeated and asseverated to the jury, when their minds were entirely free from bias, prejudice, or partiality, when they had no knowledge or opinion of the defendant, or of the merits or demerits of his prosecution, and before they had heard any evidence, and when they were bound to presume him innocent, must have produced an ineffaceable and permanent impression. * * * It was fastened upon their minds, and was mingled with the testimony past the possibility of separation, and it had been weighed, with the testimony, in those nicely balanced scales which are made so easily to preponderate. The statements had been deliberately made, and they were approved by the court. It was too late, at the end of the trial to correct the error. Their full effect upon the minds of the jury had been produced in prejudicing them against the prisoner, and unfitting them for an impartial hearing of the evidence and trial of the cause."

In *People vs. Shanley, supra,* in reversing a case for error caused by the District Attorney stating to the jury that the defendant's attorney had "offered to let him plead to assault in the second degree," the court said:

"The statement was wholly unauthorized, and was distinctly prejudicial to the defendant, in the highest sense, * * * it * * * was in effect, saying to the jury: 'The defendant's attorney knows the man is guilty, as he advised him to plead guilty to assault in the second degree.' The

jury could get no other impression from this statement than that the defendant was guilty, either of the act with which he was charged or of some degree of such offense and that both he and his attorney knew it."

In *Wyatt vs. State, supra,* the prosecuting attorney asked the defendant if he had not theretofore been convicted "and given ten years in this case?" To which objection was made and sustained, the prosecuting attorney reprimanded and the jury instructed that they were not to consider the question for any purpose whatever. The court said in reversing the case:

"It is true, there was no answer to the question; but it was stated in such a manner that the jury did not fail to understand what was meant, * * * and this bill demonstrates the further fact that it was an intentional allusion by the attorney asking the question to the former conviction. * * * While not answered in terms, in the light of the entire record, the jury knew the fact from the question and all that occurred as certainly and as truly as if it had been answered in the affirmative. It is unfortunate that we should under such circumstances be required to reverse a case. But we cannot consent to the impairment or infringement of a right which the law in express terms gives every defendant, however humble."

In *State vs. Montgomery, supra,* the Supreme Court of Washington in reversing a conviction on the ground of excessive and prejudicial zeal of the prosecuting attorney, said of the duty of such officer:

"* * * The safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims."

Persistence, on the part of the district attorney, in asking questions which he knows, or has reason to suppose from their character, the court will not permit to be answered, constitutes reversible error.

*People vs. Mullings,* 83 Cal. 138, 23 Pac. 229.
*Cargill vs. Commonwealth,* Ky. (1890), 13 S. W. 916.
*Gale vs. People,* 26 Mich. 157.
*Barton vs. Bruley,* 119 Wis. 329, 96 N. W. 815.

*People vs. Derbert,* 138 Cal. 467, 71 Pac. 564.
*People vs. Smilie,* 118 App. Div. 611, 103 N. Y. Sup. 348.
*State vs. Trueman,* 34 Mont. 249, 85 Pac. 1024.
*State vs. Blydenburg,* 135 Iowa 264, 112 N. W. 634.
*Spencer vs. Commonwealth,* 32 Ky. L. R. 880, 107 S. W. 342, 345.
Wigmore on Evidence, Sec. 1808.

As said in *People vs. Mullings, supra*:

"The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense."

In *Cargill vs. Commonwealth, supra,* speaking to this point, the court said:

"It had the effect to prejudice the jury, and must have been asked for that purpose; and the fact that the court refused to permit the question to be answered did not remove the effect it might and probably did have on their minds."

In *State vs. Blydenburg, supra,* in reversing a case wherein defendant was accused of poisoning his wife with "Rough on Rats," which the court declined to judicially notice as being poison, the court said:

"There is much in this record, * * * to justify us in saying that the prosecutor here allowed his zeal of advocacy to betray him into palpable abuse of the privileges of counsel. This is especially marked in the last three questions above quoted. For half an hour or more he had been making repeated and strenuous effort to avoid both the rule of law which confronted him and the adverse holding of the trial court, and then, when the court had finally and decisively excluded the matter, counsel, in apparent deliberate disregard of the ruling against him, put the question: 'You may state whether or not at that time the defendant was suffering from having taken poison.' The counsel conducting this examination is an experienced lawyer. * * * But, even if right in his contention for the admissibility of this testimony, it was impossible for him to have misunderstood the force and effect

of the rulings of the court which stamped the evidence sought as incompetent for the purposes of that trial. He had made his record, and preserved his exception, and was bound by every rule of law and orderly practice to respect it. In failing to do so, and putting the question above quoted, we are forced to the conclusion that it was inspired, not by the hope of getting an answer, because the attitude of the court assured him that it would be excluded, not to make a record for the purpose of an appeal, because the record was already complete, but rather to get it into the minds of the jurors that the defendant under the sting of a guilty conscience had attempted suicide. If 'Rough on Rats' contains any more subtle or effective poison than did this question under the circumstances, then, indeed, it is a most powerful agent of destruction. There may be circumstances under which the injurious effects of such a question would be neutralized by the adverse ruling or by the injunction of the trial court, but such are not the circumstances here presented. The long and spirited discussion between counsel on either side, and the court, was of a character to rivet the attention of the jurors and the persevering effort of the prosecution to break down the barrier of objections and adverse rulings, must naturally have excited their intense interest in anticipation of some startling disclosure if only the door thereto could be opened, and when counsel, defying the ruling against him, said in effect to the jury that, if permitted to do so, the witness would swear that appellant had attempted self destruction, he inflicted an injury upon the defense, which no amount of admonition by the court could repair."

In *People vs. Smilie, supra*, the court said:

"The manifest purpose of this examination was to create the impression in the minds of the jurors that Smilie had stolen money from King, and the offense charged in the indictment was stealing money. This conduct was improper, and the vice of the testimony was not cured by excluding the evidence. *Manigold vs. Black River Tr. Co.*, 81 App. Div. 381, 80 N. Y. Sup. 861. And the most vicious part of the examination was in the question put by the district attorney after the court had indicated clearly that this line of testimony was improper. The testimony of Webb, with his participation in the dice throwing, was not of the strongest probative force, and the defendants were entitled to a fair trial for the precise offense charged in the indictment."

The case of *Manigold vs. Black River Tr. Co.*, 81 App. Div. 381, 80 N. Y. Sup. 861, cited in the foregoing case of

*People vs. Smilie*, was an action for damages for personal injuries, in which counsel for plaintiff asked a witness on cross-examination, in referring to a physician, 'wasn't he representing the insurance company back of this company?', the court said in reversing the case:

"The law is well settled that it is improper to show, in an action of negligence, that the defendant is insured against loss in case of a recovery against it on account of its negligence. * * * It is not proper to inform the jury of such fact in any manner. It is not material to any issue involved in the trial of the action, and *certainly plaintiff's counsel ought not to be permitted to do indirectly what he would not be permitted to do directly.* The fact that the defendant in this action was insured was brought to the knowledge of the jury as conclusively by what occurred as if the question had been answered in the affirmative, and it is evident that the question was asked and the inquiry pressed, even after the ruling of the court that it was incompetent, for the very purpose of getting such fact before the jury. Immediately before the direct question was asked, the court had ruled that the inquiry as to who Dr. Rockwell represented was incompetent, and the objection to that question was sustained, and yet plaintiff's counsel then asked the direct question, which was, in effect, a statement that there was an insurance company back of the defendant. In order to protect the defendant, its counsel was forced to object to the question, and yet by doing so he, in effect, admitted the fact; otherwise no objection would have been made. It is true the learned trial court properly struck out the answer, and instructed the jury not to consider it; but plaintiff's counsel improperly got the fact before the jury—a fact which he knew he was not entitled to, and which the court had just excluded by its ruling. We think this constituted error which requires a reversal of the judgment."

The preceding case is only one of the many hundred civil damage cases which have been reversed because counsel for plaintiff has poisoned the minds of the jury so that they could not act impartially and without bias. Should the precautions and safeguards against an unfair conviction for a capital crime be less than in a case where merely money is involved, and that too when it is generally the money of a corporation whose impoverishment would not follow being mulcted? If the rules and reasoning of the preceding case, which is typical, are applied to the case at bar, a reversal will be ordered.

In *Spencer vs. Commonwealth, supra*, the court in re-

versing the case, quotes with approval from *Baker vs. Com.*, 106 Ky. 212, 50 S. W. 54, as follows:

"Counsel for the commonwealth should aid the court in keeping from the jury all testimony which the court has ruled to be incompetent; for, though testimony which reaches the jury be excluded by direction of the court, the impression, especially if the statement is often repeated, is likely to remain on the minds of the jury."

The same case also quotes with approval from *Marcum vs. Hargis*, 31 Ky. Law Rep. 1117, 104 S. W. 693, as follows:

"It cannot be doubted that, in jury trials, incalculable harm is often done by counsel in asking known incompetent questions in the hearing of the jury, and thereby forcing the adverse party to object to them, also in the hearing of the jury, which manifests his fear of the incompetent questions, and gives emphasis to the harmful matter they are supposed to contain."

It is error for the prosecutor to make any statement in the presence of the jury, implying that the accused has confessed the crime for which he is being tried, unless evidence tending to prove such matter is submittd to the jury.

*State vs. Williams* (Nev.) 102 Pac. 974, 977.
*Hardtke vs. State*, 67 Wis. 552, 30 N. W. 723.

In *Hardtke vs. State, supra*, the court said in reversing a conviction for rape, in which the prosecutor had testified as a witness that defendant had said to him: "I didn't hurt the girl much":

"On the argument of the cause to the jury the district attorney said, 'The defendant confessed this crime to me.' To this remark and others the defendant's counsel objected and excepted and the record does not show that the court gave it any attention whatever. * * * It was very material. There had been no evidence of one of the principal ingredients of the crime, and if this statement of the district attorney was accepted by the court and jury as true, it supplied all defects in the testimony, and was a full confession of the crime."

That remarks or proceedings inherently prejudicial to the accused and having a tendency to deprive him of a fair trial, are ground for reversal and new trial has been repeatedly held, notwithstanding the fact that an attempt has been

made to obliterate from the minds of the jurors the prejudicial effects of the same.

*Rudd vs. U. S.*, 173 Fed. Rep. 212.
*Starr vs. U. S.*, 153 U. S. 614, 626, 38 L. Ed. 841.

That the remarks of the District Attorney and his questions hereinbefore set out were inherently prejudicial, we believe cannot be doubted. And with how much greater reason should they be ground for reversal when no attempt was made to obliterate the effects of the same from the minds of the jurors? That no attempt to obliterate the prejudicial effect of the proceedings from the minds of the jurors, for the reason that the learned trial court did not recognize them as prejudicial, appears from the opinion of the court (R. 12):

"I believe that the trial was fair, that neither the jury nor the United States Attorney were guilty of any misconduct, that no error prejudicial to the defendant occurred. * * *"

The presumption always is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have prejudiced the complaining party that the rule that errror without prejudice is no ground for reversal is applicable.

*People vs. Altman*, 147 N. Y. 473, 42 N. E. 180.
*People vs. Smilie*, 18 App. Div. 611, 103 N. Y. S. 348.
*People vs. Wells*, 100 Cal. 459, 34 Pac. 1058.
*People vs. Bowers*, 79 Cal. 415, 21 Pac. 752.
*Union Pac. R. Co. vs. Field*, 137 Fed. 14, 69 C. C. A. 536.
*U. S. vs. Gentry*, 119 Fed. 75, 55 C. C. A. 658.
*Moores vs. Bank*, 104 U. S. 625, 26 L. Ed. 870.
*Gilmer vs. Higley*, 110 U. S. 47, 28 L. Ed. 62.
*R. R. Co. vs. O'Brien*, 119 U. S. 103, 30 L. Ed. 299.
*Mexia vs. Oliver*, 148 U. S. 675, 37 L. Ed. 602.
*R. R. Co. vs. O'Reilly*, 158 U. S. 337, 39 L. Ed. 1006.
*Peck vs. Heurick*, 167 U. S. 629, 43 L. Ed. 302.
*Deery vs. Gray*, 5 Wall. 807, 808, 18 L. Ed. 653.
*Smith vs. Shoemaker*, 17 Wall. 639, 21 L. Ed. 717.

## THE RECORD FAILS TO SHOW EXCLUSIVE FEDERAL JURISDICTION OVER THE PLACE WHERE THE CRIME WAS LAID.

Assignments of Error numbered 18, 19, 20, 21, 22, 23, 39 and 45 will be discussed together. They are (R. 76, 77, 80):

18. The court erred in permitting the witness M. C. Buckey to testify from the book entitled "United States Military Reservations, National Cemeteries, and National Parks, compiled in 1904," and marked "Plaintiff's Exhibit B."

19. The court erred in permitting plaintiff to introduce in evidence before the jury the following deeds: From Francis W. James to the United States, dated April 14, 1897; from Samuel B. Harned to the United States, dated May 6, 1897; from T. B. Wilcox to the United States, dated June 5, 1897; from Louisa Stall to the United States, dated April 17, 1897; from Mary Thompson et vir. et al. to the United States, dated June 14, 1897; from Walter C. Smith et ux to the United States, dated June 17, 1897; from the Starrett Estate Co. to the United States, dated May 8, 1897; from Mary J. Tucker et vir, dated June 16, 1897; and from the State of Washington to the United States, dated April 4, 1898; and the decrees in condemnation proceedings, as follows: Decree in cause No. 1169 in the district court of the United States for the district of Washington, entitled United States vs. Charles Isenbeis, and decree in cause No. 2098, in the United States district court for the district of Washington, northern division, entitled United States vs. Helen M. Freeman et al.; the same being plaintiff's Exhibits C to M, inclusive.

20. The court erred in receiving in evidence for any purpose the book entitled "United States Military Reservations, National Cemeteries, and National Parks," marked "Plaintiff's Exhibit B."

21. The court erred in refusing to strike from the record the testimony of witness M. C. Buckey; purporting to identify the property covered by the deeds to the United States from the following persons: Francis W. James, Samuel B. Harned, T. B. Wilcox, Louisa Stall, Mary Thompson et vir. et al., Walter C. Smith et ux., Starrett Estate Co., Mary J. Tucker et vir., the State of Washington, and by the decrees in causes United States vs. Charles Isenbeis and United States vs. Helen M. Freeman et al., said instruments being plaintiff's Exhibits C to M, inclusive.

22. The court erred in permitting the witness M. C. Buckey to testify that the band barracks at Fort Worden

Military Reservation are located upon any part of the land described in any of plaintiff's Exhibits C to M, inclusive.

23. The court erred in refusing to strike from the record the testimony of witness M. C. Buckey, that the band barracks aforesaid are located upon part of the land described in plaintiff's Exhibits C to M, inclusive.

39. The court erred in permitting the book (plaintiff's Exhibit B) entitled "United States Military Reservations, National Cemeteries, and National Parks; Jurisdiction, Title, etc.," to be taken by the jury to the jury room and there remain while the jury deliberated and found the verdict herein.

45. The evidence was insufficient to sustain the verdict in that there was not sufficient evidence to show that the United States exercised exclusive jurisdiction over the place where the crime charged in the indictment herein is alleged to have been committed at the time when said offense is alleged to have been committed.

The indictment on which this prosecution was conducted is founded on Section 5339 U. S. R. S. which provides: "Every person who commits murder—fiirst, within any fort * * * under the exclusive jurisdiction of the United States; * * * shall suffer death." Exclusive jurisdiction of the Federal Government in this case is predicated on Article 1, Sec. 8, Clause 17 of the Federal Constitution: "The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever, * * * over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, * * *."

The only consent of the State of Washington pursuant to the above constitutional provision is found in Section 6853 Rem. & Bal. Code (Bal. Code §2110; Laws of Wash. 1890 p. 459, §1; Laws of Washington 1891 p. 31, §1): "The consent of the State of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, * * * for the sites of forts. * * * authorized by any act of Congress, * * * the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the constitution of the United States, and with the acts of Congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemna-

tion, or set apart by the general government for any or either of the purposes before mentioned. * * *"

On the trial of this cause, M. C. Buckey, Captain in the United States Army, while on the witness stand, was shown a book which is before this court as "Plaintiff's Exhibit B." The book was introduced in the following manner:

MR. TODD: Q. I show you a book entitled "United States Military Reservations and National Cemeteries and Military Parks, compiled in 1904," and I will ask you under whose authority that book is prepared.

A. This book was prepared in the office of the Judge-Advocate-General.

Q. Under the authority of what department?

A. That is the department, from the War Department.

Q. Turn to the part of that book relating to the Fort Worden Military Reservation?

A. At page 389 of this book "Fort Worden with its titles for the property" appears.

MR. TODD: If the court please, I understand this is simply a question for the court, whether Fort Worden is a military reservation, and the court, being satisfied by the evidence of that, will instruct the jury whether a certain event took place on the Fort Worden Military Reservation as a fact for the jury. But the court takes notice of its own jurisdiction, and that is a matter for the court to determine. I offer this book in evidence for the consideration of the court alone.

MR. RIDDELL: To refresh the memory of the court?

MR. TODD: Yes; to refresh the memory of the court.

MR. TODD: I offer in evidence certain copies of the records of the Auditor of Jefferson County, being the deeds and decrees in condemnation, referred to in that book.

MR. RIDDELL: I object to that method of proving title, may it please the court. The book itself is not any evidence. The question as to whether or not the Fort Worden Military Reservation is placed under the exclusive jurisdiction of the United States is a question for the jury alone and the United States Supreme Court has so held in the case of the U. S. vs. Jackallow in first Black.

THE COURT: The objection is overruled to the offers and the documents may go in evidence.

MR. RIDDELL: We desire an exception.

THE COURT: An exception allowed.

(Book marked "Plaintiff's Exhibit B" received in evidence). (R. 29-30.)

The witness Buckey then read to the jury the descriptions of the instruments mentioned in that book, which is before this court as "plaintiff's Exhibit B" and the prosecutor offered in evidence the alleged instruments so described by the witness. The witness testified that he had no personal knowledge as to whether what he knew as Fort Worden was or was not co-extensive with the property described in those several deeds.

(R. 33) THE COURT: I presume those papers are admissible in evidence. You may make all the objections you want to make to the evidence and have your exceptions. I am not going to declare now the effect of this evidence, whether it proves anything or not. I am not going to declare that now. All I have to say is that these papers and this evidence is competent and admissible and it may be considered for what it is worth.

MR. RIDDELL: We ask that the testimony of the witness as to indentifying the land described in these exhibits be stricken from the record on the ground that the witness has no personal knowledge and has not refreshed his memory from a book, which it is proper for him to do so.

THE COURT: The motion to strike is denied.

MR. RIDDELL: Allow us an exception.

THE COURT: An exception allowed.

Later in the trial Capt. Buckey was recalled and testified that he had examined certain maps and from computations based on those maps had determined that the Band Barracks at Fort Worden was located on property described in one of the instruments which had been received in evidence. He had no personal knowledge that the map on which he made his computation was accurate, he did not make the map, he did not know who made it. (R. 35-37.)

(R. 37.) Q. What maps were those, Captain?

A. Those were official maps on file in the engineer's office.

Q. In what engineer's office?

A. Engineering office of this district; United States Engineering office.

Q. Made under authority of what department?

A. Of the Engineering Department of the United States Army.

Q. That is a part of the War Department of the United States?

A. Yes, sir. (R. 37.)

(R. 38) MR. RIDDELL: We ask that his testimony be stricken on the ground that the witness has no knowledge and

the maps haven't been introduced in evidence, or shown to be correct.

This is all the evidence offered bearing on the jurisdiction of the United States over the place where the crime is alleged to have been committed. The subject of Federal jurisdiction over Fort Worden was never raised at any other time during the trial except in the instructions by the court, which on this subject are in full as follows:

(R. 56) THE COURT: Gentlemen of the jury, * * * This court is a court of the United States Government, administering only the laws of the United States, and its jurisdiction is limited by the constitution and laws of the United States. This court cannot try a man or punish a man for the crime of murder committed in the State of Washington unless he comes within the terms of the grant of jurisdiction and the terms of the law defining crimes punishable under the laws of the United States. Therefore, in this case, to show the jurisdiction of the court, it is charged in the indictment that this offense was committed by the defendant at Fort Worden, a place under the exclusive jurisdiction of the United States, being a military post or fort. That is one of the facts which has to be proved by the Government in the case, and must be passed upon and decided by the jury that the offense, whoever committed it, was committed within the limits of the Fort Worden military post, and that that post was at the time within the exclusive jurisdiction of the United States.

Ordinary offenses of this character are tried and determined by the courts of the respective States, and it is only when they are committed in some place or district of the country under the exclusive jurisdiction of the United States that the jurisdiction of the Federal court attaches.

The question, whether Fort Worden Military Reservation is a place, the exclusive jurisdiction of which has been ceded to the United States, and the question whether the homicide charged in this case was committed within the confines of the territory so ceded, is a question of fact for you to determine from the consideration of the evidence, and, unless the Government has proven, beyond a reasonable doubt, that the homicide was committed within the boundaries covered by, or included within the cession, then it would be your duty to acquit the defendant. (R. 56-57.)

Captain Buckey testified to the accuracy of a map, introduced in evidence as plaintiff's Exhibit "A" (R. 28-29), which is not in the record before this court. It is proper to call

the attention of the court to the fact that it has no bearing on the point now under discussion, for Captain Buckey testified (R. 35):

Q. You have no further knowledge, Captain, as to whether the fence that you say you know encloses the reservation is identical with the boundaries of the lines appearing in these documents or map put in evidence?

A. I know from my personal knowledge that that fence practically is coincident with the boundary shown in that map.

Q. On the map?

A. Yes, sir.

Q. How about the boundaries shown on the deeds and decree in condemnation?

A. From the deeds, I don't know of my own personal knowledge.

Therefore, the map introduced in evidence has no bearing on the point now being discussed.

All the exhibits in the case including "Plaintiff's Exhibit B" were taken to the jury room when the jury retired and there remained until the verdict was rendered. (R. 61.)

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, * * *"

In his opinion denying the motions for a new trial and the arrest of judgment herein his Honor said: "* * * exclusiveness of jurisdiction of the National Government is an element of the crime and one of controlling importance affecting the jurisdiction of the Court. * * *" (R. 15.)

If Section 5339 U. S. R. S. had read: "Every person who shall commit murder within the Fort Worden Military Reservation shall suffer death" that would have rendered the question of the jurisdiction of Congress to pass such a law the only point in issue on this question. Had that law been passed and had Congress the jurisdiction to pass it the sole question on this phase of the case would have been whether the crime charged was committed within that place. Such, however, is not the language of Section 5339. It provides for punishment of that offense when committed within places of a certain specified character and even when it is determined that the law is constitutional, there still remains to be determined in each particular case the further question as to the character and locality of the place where the crime is laid. Therefore, the language of the court was accurate when he characterized the questions as to the character and locality of

Fort Worden as "an element of the crime." That being so, the defendant was entitled to have the questions determined in accordance with the principles of law governing trials by jury. This right is guaranteed him by the Sixth Amendment.

If the evidence, which was introduced in this case was competent and sufficient to sustain the verdict on this point, our inquiry is at an end. But the court will notice that the testimony of Capt. Buckey and the documents received in evidence all depended for their materiality upon his statements as to the contents of "Plaintiff's Exhibit B" and as to the facts shown on the map, which he examined, but which was not offered or received in evidence. The whole fabric of the evidence as to jurisdiction over Fort Worden is built upon that book and that map but the book and the map were never offered in evidence for the consideration of the jury. Furthermore, under Sec. 882, U. S. R. S. they were not competent. "Copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof." Therefore all the testimony as to jurisdiction is based on two documents neither of which was offered or received in evidence for the consideration of the jury, both of which were inadmissible and hearsay of the plainest kind. For these reasons, we take it that the testimony utterly fails to support the verdict in this case.

In his opinion herein the trial court holds that he was justified in taking judicial notice of federal jurisdiction over Fort Worden. (R. 13.) But this court will see from the portions of the record pointed out above that the court never, in the presence of the jury, judicially noticed that fact. The only two times it was called to his attention he expressly refused to judicially notice the fact. On the first occasion he said: "I am not going to declare now the effect of this evidence, whether it proves anything or not. I am not going to declare that now. All I have to say is that these papers and this evidence is competent and admissible, and it may be considered for what it is worth." (R. 33.) The second time the question was called to his attention was in the instructions to the jury (R. 56-57), when he charged them that the question of federal jurisdiction over Fort Worden was one of fact for them.

We contend that jurisdiction having been "an element of the crime" and the defendant being entitled to a jury trial and the court having failed to instruct the jury that the Government was relieved of the necessity of introducing evidence on the point, there is nothing in the record to sustain the

conviction by the triors of that fact. "Judicial notice being a dispensation of one party from producing evidence, it would seem that the party must, in point of form, make a request for it."

> *Wigmore Evidence,* Vol. 4, p. 3602, Sec. 2568, citing *Amundson vs. Wilson* (1902), 11 N. D. 193, 91 N. W. 37.

But we contend that the court should not have judicially noticed the jurisdiction in any event. The grounds on which the trial court afterward asserted his right to judicially notice jurisdiction are found in his opinion. (R. 13.)

"The property rights and the authority of the National Government, within defined boundaries. cannot be disputed in a collateral proceeding by an individual not pretending to have adverse rights or superior authority. As to all such matters the courts respect the authority asserted by the political department of the Government."

In order to determine what branch of the Government has the power to determine the question, reference must first be had to the Constitution, which provides: "The Congress shall * * * exercise exclusive legislation in all cases whatsoever * * * over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, * * *"

The constitution, therefore vests the control of all such places in Congress. His Honor had resort to the records of the War Department to determine that that department had recognized the exclusiveness of federal jurisdiction over Fort Worden. We have, however, found no act of Congress authorizing the Secretary of War to decide that question. Nor does that department obtain that power by virtue of the use of Fort Worden as a military reservation.

In *Fort Leavenworth R. R. Co. vs. Lowe* (1885), 114 U. S. 525, 539, 541, 29 L. Ed. 264, Mr. Justice Field for the court said:

"Where, therefore, lands are acquired in any other way by the United States within the limits of a state than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the General Government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed.

Such is the law with reference to all instrumentalities created by the General Government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limit. * * * As instrumentalities for the execution of the powers of the General Government they are, as already said, exempt from such control of the States as would defeat or impair their use for these purposes. * * *"

Therefore the mere fact that the War Department is exercising control over Fort Worden is not evidence of exclusive jurisdiction for that authority is just as consistent with a concurrent jurisdiction in the state as it is with exclusive jurisdiction in the United States.

Nor has Congress, so far as we have been able to find, ever declared that the Federal Government exercises or possesses exclusive jurisdiction over Fort Worden. It is therefore unnecessary to go into the questions discussed in the cases cited by His Honor for in all of them there had been a declaration by the Federal Government claiming exclusive jurisdiction over the place in question as within our national boundaries, or the cession of jurisdiction had been made by a public act of the state, of which it was proper for the court to take judicial notice.

*James G. Swan,* 50 Red. Rep. 108,
*Jones vs. U. S.,* 137 U. S. 202,
*Benson vs. U. S.,* 146 U. S. 331.

In the case at bar we concede the propriety of the court taking judicial notice of the act of the State of Washington, being Sec. 6853 Rem. & Bal. Code, but neither that act nor Sec. 5339 U. S. R. S. is a declaration of the character of the jurisdiction exercised by either branch of the Government over Fort Worden. The consent of the State of Washington is conditional upon the acquisition of the land "by purchase or by condemnation" for the purposes enumerated in Art. 1, Sec. 8 of the Federal Constitution. The consent of the State of Washington upon which exclusive jurisdiction depends is conditional upon the question of fact, namely, has the land on which Fort Worden is situated been acquired by purchase, condemnation or otherwise? This is a fact of which no court can take judicial notice and the record in this case is complete. The evidence does not sustain the conviction unless it

appears by competent evidence that the land on which Fort Worden is situated was acquired by purchase or by condemnation. Our contention is borne out by the method adopted by Mr. Justice Story in *U. S. vs. Cornell* (1819), Fed. Cas. 14867, 14868. In that case it appears that Congress in Chap. 9 of the Act of March 20, 1794, had authorized the purchase of Fort Adams, that the Legislature of Rhode Island by the Act of the same year (Laws R. I. 551) had authorized the sale of such lands by and with the consent of the Governor of the state. The Governor had given his consent by a certificate on the original deeds, copies of which had been introduced in evidence. It is apparent, therefore, that Judge Story did not take judicial notice of the character of federal jurisdiction over Fort Adams but left it as a matter of fact to the jury. A similar conclusion is reached in *People vs. Collins* (1895), 105 Cal. 504-539, 39 Pac. 16. Haynes, Chancellor, speaking for the court says:

"The mere ownership by the United States of land or property within the county does not show any federal jurisdiction over crimes committed upon it, as that fact does not oust the jurisdiction of the state; but the ownership must be acquired by purchase with the consent of the legislature, which is held to include the acquisition of property by eminent domain when that proceeding is authorized by the legislature. *U. S. vs. Cornell*, 2 Mason 60, Fed. Cas. No. 14867; *U. S. vs. Jones*, 109 U. S. 513, 3 Sup. Ct. 346. The federal jurisdiction, therefore, involves a question of fact, viz. a purchase by the United States, or the acquisition of property by a proceeding to condemn it, and of such questions courts will not take judicial notice. It is a matter of common knowledge that the United States occupies buildings for custom house, post office, and other purposes; but whether they are occupied under leases from private owners, is a matter to be proved by the record of the conveyances. * * *"

In *Phillips vs. Payne* (1876), 92 U. S. (2 Otto.), 130, 23 L. Ed. 649, Alexandria County had by the United States been ceded back to Virginia. The cession naturally was a public act of Congress of which the federal courts must take judicial notice and it appears from that decision that the cession had been recognized by the public acts, not only of the United States, but of Virginia.

In *W. U. Tel. Co. vs. Chiles* (1909), 214 U. S. 274, 53 L. Ed. 994, it appears that the cession of the Norfolk Navy Yard pursuant to Art. 1, Sec. 8, Clause 17 of the Constitution had

been made through public acts of the Legislature and Governor of Virginia.

The record in the case of *Thomas Battle vs. U. S.*, 209 U. S. 36, 52 L. Ed. 670, does not show what was the act of Georgia ceding jurisdiction, nor how the question was raised, but if a cession occurred by a public act of the Legislature, it is on the question now being discussed, a parallel case with the *Phillips* and *Chiles* cases mentioned above and easily distinguished from the case at bar by the fact that this record fails to show by competent evidence that the land on which Fort Worden is located was ever, as a matter of fact, procured by the Federal Government "by purchase or by condemnation."

But His Honor went father in his opinion sustaining the conviction in this case. "'I hold that the validity of the title so acquired, *the identification and definite location of the land and the accuracy of its boundaries*, are matters within the scope of the powers and duties pertaining to the executive branch of the Government to ascertain and settle, and not subject to judicial scrutiny in the trial of a criminal case." (R. 13.)

This court has, however, decided that the ascertainment of a boundary is not a question of law but is a question of fact to be determined by the jury. *U. S. vs. Jackallow*, 66 U. S. (1 Black.) 484, 17 L. Ed. 225. In that case defendant was indicted for an assault alleged to have been committed under the Act of May 15, 1820 Chap. 113, "which enacts that if any person shall, upon the high seas, * * * commit the crime of robbery in or upon any ship or vessel or upon any of the ship's company * * * on being convicted before the Circuit Court of the United States for the district into which he shall be brought or on which he shall be found, shall suffer death. There is a proviso which declares that nothing in the section shall be construed to deprive any particular state of its jurisdiction over the offense when committed within the body of a county, or authorize the courts of the United States to try such offenders after conviction or acquittance for the same offense in the state court.

The second section of the 3rd article of the Constitution provides that 'the trial of all crimes, except in case of impeachment, shall be by jury; and such trial shall be held in the state where the crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may, by law, have directed.'

A material question in this case, in view of this provision of the Constitution, was, whether or not the offense was com-

mitted out of the jurisdiction of any particular state, because, if not, inasmuch as it was not committed within the state of New Jersey, the Circuit Court of the district of that state had no jurisdiction. That jurisdiction depends upon two facts: First, that the offense was committed out of the jurisdiction of any other of the states of the Union; and, second, that the prisoner was first apprehended in the district of New Jersey. * * *

Now, the special verdict finds that the offense in this case was committed upon the 'SPRAY,' lying in waters adjoining the State of Connecticut, between Norwalk Harbor and Westchester County, in New York, at a place five miles eastward of Lyons Point, and a mile and a half from the Connecticut shore. Whether this place thus described is out of the jurisdiction of the state or not is not found, and is, of course, necessarily left to the court to determine. * * *

We have not referred to this boundary of New York for the purpose of determining it, or even expressing an opinion upon it, but for the purpose of saying that the boundary of a state, when a material fact in the determination of the extent of the jurisdiction of the court, is not a simple question of law. The description of a boundary may be a matter of construction, which belongs to the court; but the application of the evidence in the ascertainment of it, as thus described and interpreted, with a view to its location and settlement, belongs to the jury. All the testimony bearing upon this question, whether of maps, surveys, practical location, and the like should be submitted to them under proper instructions to find the fact.

We do not think the special verdict in this case furnishes ground for the court to determine whether or not the offense was committed out of the jurisdiction of the state, and shall direct that it be certified to the Circuit Court, to set aside the special verdict, and grant a new trial."

*U. S. vs. Jackallow, supra.*

Here is a decision on all fours, which we believe is controlling in the case at bar and is beside the question as to judicial recognition of the exclusive jurisdiction of the United States over Fort Worden, for even if the United States had exclusive jurisdiction over that place it still remains to determine as to where that place is.

*Diggins vs. Hartshorn* (1895), 108 Cal. 154, 41 Pac. 283, is an authority, if more is needed on this point: "It has never been held, however, that a court would by its judicial knowledge determine whether the space set apart upon a map for a

street is correctly located upon the ground, or, when the line of such street as a boundary is disputed, fix it, without evidence."

*U. S. vs. Palmer* (1818), 3 Wheat. (16 U. S.) 610, was a case brought to this court under writ of error after a conviction for piracy. It was contended that the alleged piracy was committed by virtue of the authority of a de facto Central American Government. The United States Government had never recognized either the belligerency or the independence of the Government whose authority was set up as justification, nor had our Government ever expressly refused so to recognize it. If, in the case at bar this court shall find that the Congress of the United States has never either declared or refused to declare that it has or has not the power of exclusive jurisdiction over Fort Worden, then we contend that this court should apply the principle enunciated by Chief Justice Marshall in the Palmer case, where at page 635 he says: "It follows as a consequence, from this view of the subject, that persons or vessels employed in the service of a self-declared government, thus acknowledged (by the United States) to be maintaining its separate existence by war, must be permitted to prove the fact of their being actually employed in such service, by the same testimony which would be sufficient to prove that such vessel or person was employed in the service of an acknowledged state. The seal of such unacknowledged government cannot be permitted to prove itself; but it may be proved by such testimony as the nature of the case admits; and the fact that such vessel or person is so employed may be proved without proving the seal."

In the absence, therefore, of a declaration by the Congress that Fort Worden is under the exclusive jurisdiction of the United States, the question should be proved, as the great Chief Justice suggests, as one of fact. The Government should by competent evidence have established, if such was the fact, that Fort Worden was acquired by the federal Government "by purchase or by condemnation." This should have been done by the introduction in evidence of the title deeds and the identification by competent testimony of the land therein described as identical with the land on which Fort Worden stands. In the absence of such competent evidence, we contend that the record fails to show that the United States has exclusive jurisdiction over Fort Worden. We also contend that the record fails to show the location on the ground of such place and that under the principle of *U. S. vs. Jackallow, supra*, the record is likewise defective.

## COMPELLING THE DEFENDANT TO PUT ON HIS COAT FORCED HIM TO GIVE EVIDENCE AGAINST HIMSELF.

Assignments of error numbered 24, 25 and 26 will be discussed together (R. 77). They are:

24. The court erred in permitting witness E. H. Porter to testify that the defendant put on a blouse of a military uniform (introduced in evidence as plaintiff's exhibit S), and that the blouse fit the defendant.

25. The court erred in permitting witness R. P. Reeder to testify that the defendant put on a blouse of a military uniform (introduced in evidence as plaintiff's exhibit S), and that the blouse fit the defendant.

26. The court erred in permitting witness Harry W. Newton to testify that the defendant put on a blouse of a military uniform (introduced in evidence as plaintiff's exhibit S), and that the blouse fit the defendant.

An olive drab blouse, part of a soldier's uniform such as was worn by the different soldiers at the Fort, was marked for identification "plaintiff's exhibit S."

Doctor Porter and Captain Newton, members of the board of inquiry, appointed to determine the identity of the deceased, to fix the responsibility for his death and to apprehend the parties found by them to be guilty, and Captain Reeder, who was present at many of the sittings of the board, were permitted, over defendant's objection, to testify that the blouse was put on by the defendant and that it fit him. This action of the defendant occurred after many of the improper inducements were made which resulted in an alleged incriminating statement. All these officers were the superior officers of the dfendant who, at that time, was an enlisted man in the United States army. The body of the deceased was found burning in a furnace. The testimony of these officers was introduced to show that this blouse, which has black marks on it, was the blouse of the defendant, through the testimony that he had put on the blouse and that it fit him.(R. 38-43, 54-55).

Between the time that Doctor Porter's testimony on this point occurred (R. 38-42) and the time that Captain Newton's testimony was given (R. 54-55), the court went into the matter of the inducements which had been made to force the defendant to talk. This court will, therefore, note that, on the occasion of Captain Newton's testimony, the court had already been informed of many of the circumstances which clearly rendered defendant's statements and actions involuntary. The

theory of the court in receiving this evidence from Doctor Porter rendered it unavailing to urge the inducements which had been made, as a special ground of objection to this testimony, although, when it was first offered, defendant asked permission to cross-examine the witness to show that the alleged action of defendant occurred after improper inducements had been made.

(R. 40). MR. CALDWELL: We submit that this fact that the defendant, an enlisted man, was instructed by his superior officer to do a thing, left him no exercise of his own discretion or his own will in the matter, and, in effect, compelled him to do so.

THE COURT: Well, that belonged to the same class of evidence as the shoes that a man has on, or his clothing, too, or his measurement, or the color of his hair, the color of his eyes. Witnesses that have made observations of that kind can tell what they were. It is not compelling the accused person to say anything, or speak at all. His identity can be testified to by witnesses that have examined him.

MR. CALDWELL: Will your honor recognize any distinction between the clothes which he already has on and the clothes he is compelled to put on?

THE COURT: No more than I would recognize the distinction between clothes a man has on and a tape line, or rule, to take his measure.

MR. CALDWELL: We ask an exception.

THE COURT: Exception allowed.

MR. CALDWELL: The court's ruling is that a man could be compelled to put this coat on, whether inducements were made, or whether compelled by force, and it could still be used against him.

THE COURT: Yes; I will go that far. If he was measured against his will by any system of measurements.

MR. CALDWELL: We ask an exception.

THE COURT: Exception allowed. (R. 41.)

The same objection was renewed to Captain Reeder's testimony (R. 42), while to that of Captain Newton it was made in the following form:

MR. CALDWELL: I object to the question.

THE COURT: I overrule the objection.

MR. CALDWELL: We object to the answer on the ground that the witness was instructed to put on the coat by a superior officer, who was an officer in the United States Army, and the witness (defendant), being an enlisted man, left him to exercise no discretion in the matter and rendered his action involuntary and violative of the fifth amendment to the constitution, which we have already referred to.

THE COURT: I overrule the objection.

MR. CALDWELL: We ask an exception.
THE COURT: Exception allowed. (R. 54-55.)

The question is thus squarely raised whether a person suspected of crime and in custody of those who have power and are seeking to fix on him the responsibility for that crime may compell him to manufacture evidence against himself by acting when they can not do so by caompelling him to speak. The state authorities on this point are in some conflict and the question is further complicated by the injection of situations where witnesses offered to testify to physical facts concerning the accused which had been obtained without compelling the accused to do any act. The question is sometimes further complicated by cases where the evidence sought to be introduced consists of testimony as to the finding on the defendant of articles which the law prohibits him to possess or which were obtained by him in violation of law. We submit that the question before this court contains neither of the latter complications but resolves itself solely into the question whether the Fifth Amendment protects a person from manufacturing evidence against himself by acts as well as by words. We have not found the point decided by this court.

The somewhat conflicting state authorities will be found collected in the prevailing and dissenting opinions in *State vs. Ah Chuey*, 14 Nevada 79, 33 American Reports 530 and in notes in 28 L. R. A. 699 and 59 L. R. A. 465.

In view of the conflicting decisions we may mention the holding of this court that the varying language in which the provisions of the Fifth Amenlment has been incorporated into state constitutions "should not have a different interpretation." *Counselman vs. Hitchcock* (1892) 142 U. S. 547, 35 Law Ed. 1110.

The attitude of this court in the construction of that amendment is indicated by the following quotations from the Counselman case:

"It is a reasonable construction, we think, of the constitutional provision, that the witness is protected 'from being compelled to disclose the circumstances of his offence, the sources from which or the means by which, evidence of its commission or of his connection with it, may be obtained or made effectual for his conviction without using his answers as direct admissions against him.' *Emery's case*, 107 Mass. 172, 182."

The court also say that the constitutional provision is directed "against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and

of sources of information which may supply other means of convicting the witness or party."

This court has, therefore, gone a long way in the protection of accused persons from self-crimination.

The authorities which support our contention are reasoned closely along the line of the Counselman case in that they construe, liberally, the constitutional guarantee. The leading cases are:

*Stokes vs. State* (1875) 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72.
*Cooper vs. State* (1889) 86 Ala. 610, 6 So. 1110, 11 Am. State Rep. 84, 4 L. R. A. 766.
*Day and Slayton vs. State* (1879) 63 Ga. 667, 668.
*People vs. McCoy* (1873) 45 How. Pr. 216.

In the *Stokes* case, *supra*, the court said:

"Upon the trial of this cause, the bill of exceptions shows that the State brought in a pan of mud and placed it immediately in front of the jury, and then asked the witness if the mud in the pan was about as soft as the mud in the branch. Witness said it was. To all of which defendant objected and the same was overruled. The attorney general then called upon the defendant to put his foot in the mud. Upon objection, the court told the defendant he could put his foot in the mud if he wanted to, but he would not force him to do so. * * *

Because of this action of the Attorney general, and the assent of the court thereto, this cause is reversed and remanded. In the presence of the jury the prisoner is asked to make evidence against himself. The court should not have permitted the pan of mud to have been brought before the jury, and the defendant asked to put his foot in it. We are satisfied the jury was improperly influenced thereby. And it is no sufficient answer that the judge afterward told the jury that the refusal to put his foot in the mud was not to be taken as evidence against him. The bringing in of the pan of mud and the request of the Attorney-general was improper and should not have been permitted by the court. We greatly deprecate the practice into which some Circuit judges have fallen, in permitting incompetent and illegal testimony to be placed before the jury, and afterward, at the close of the case, withdrawing it and telling the jury not to be influenced thereby. Such testimony should be promptly rejected, and not per-

mitted to go to the jury at all, for jurors with minds untrained to legal investigations and discriminations are sometimes likely to be influenced thereby, although such incompetent evidence may be afterwards withdrawn. And while we will not reverse because of the admission of incompetent evidence afterward withdrawn, unless we are satisfied the jury was in fact influenced thereby, yet the correct practice is to reject such evidence at once, and not permit it to go to the jury.

In this case, as before stated, we are satisfied that the action of the Attorney-general in bringing the pan of mud into court and requesting the defendant to put his foot in it had an influence upon the jury prejudicial to the prisoner. Although we might be satisfied of the prisoner's guilt, yet it is our duty to see that he has a fair and impartial trial, and this he must have though costs may accumulate and punishment be long delayed."

In *Cooper vs. State, supra,* defendant was accused of burglary. The track of a stockinged foot had been found in the hall of the burglarized house. The defendant, on his capture, was asked by the prosecuting witness to take off his shoe and make a track beside the mark of the stockinged foot. Defendant refused to do so and the witness testified to his refusal. Defendant requested the court to instruct the jury to disregard this evidence. The trial Judge refused. The Supreme Court of Alabama held this to be error, saying:

"Our constitution, Article One, Section Seven, declares that the accused 'shall not be compelled to give evidence against himself.' The principle of this clause is common to the constitutions of this country. * * *"

Referring to and citing *Stokes vs. State, supra,* Chief Justice Stone continues:

"The principle of the decision from which we have quoted is that it would have been unlawful to force the witness to give (or make) evidence against himself, and the plan adopted and permitted accomplished the same result by indirect means. Thus regarded and considered, it is difficult to perceive a difference, in its hurtful bearing, between making the offer in the court room before the jury and proving by a credible witness that it had been unsuccessfully made outside of the court room.

* * * * * * *

In receiving evidence of the offer made to the prisoner to make tracks with his stockinged foot, and his reply and con-

duct consequent thereon, the criminal court erred. Reversed and remanded."

A similar rule prevails in Georgia.

Warner, Ch. Justice: "2. Allen, a witness for the State, testified in relation to Slayton, the other defendant, that he was stubborn, did not want to put his foot in the track, said he was innocent of the charge. Witness took hold of him and pulled him along, and then he put his foot in the track. The first time witness told him to put his foot in the track defendant refused. Witness then took hold of his foot and put it in the track; he did not consent to it. The shoe fitted the track. This evidence was objected to by the defendant, the objection was overruled, and that is one of the errors assigned. By the constitution of this State, 'no person shall be compelled to give testimony tending in any manner to criminate himself.' Nor can one, by force, compel another, against his consent, to put his foot in a shoe-track for the purpose of using it as evidence against him on the criminal side of the court, the more especially when the person using such force has no lawful warrant or authority for doing so. Let the judgment of the court below in both cases be reversed."

*Day and Slayton vs. State, supra.*

*People vs. McCoy, supra*, accords: In this case defendant was accused of infanticide. She was compelled to undergo examination by a physician as to whether she had lately been pregnant. His testimony as to the result of that examination was held inadmissible, the court saying:

"They might as well have sworn the prisoner and compelled her by threats to testify that she had been pregnant and had been delivered of a child, as to have compelled her by threats to allow them to look into her person with the aid of a speculum to ascertain whether she had been pregnant and been recently delivered of a child."

The leading cases holding a contrary doctrine are:

*State vs. Ah Chuey* (1879) 14 Nevada 79, 33 Am. Rep. 530.

*State vs. Graham* (1876) 74 N. C. 646, 21 Am. Rep. 493.

*Walker vs. State* (1879) 7 Tex. App. 246, 32 Am. Rep. 595.

These cases, however, can easily be distinguished. They are reasoned on the premise that the object of all evidence is to elicit the truth; that an involuntary confession is excluded, not on the ground of its violation of the constitutional provision against self-crimination, but on the ground that the inducements are such as to render it probably false. The court then say that a physical demonstration or an act on the part of the accused or his forced action in exposing a portion of his person can not result in falsehood, consequently, they hold that compelling a witness to manufacture evidence against himself by acting, can not be subject to the objection that the resulting evidence is probably false. The court will see that the basis of this argument is the reason given for the rejection of involuntary confessions. That reason, however, can not be urged in this forum for the court has held that an involuntary confession is incompetent, not because of its probable falsity but because of its violation of a constitutional provision.

"A brief consideration of the reasons which gave rise to the adoption of the Fifth Amendment, of the wrongs which it was intended to prevent, and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the Amendment was but a crystallization of the doctrine as to confessions well settled when the Amendment was adopted, and since expressed in the text writers and expounded by the adjudications, and hence that the statements on the subject by the text writers and adjudications but formulate the conceptions and commands of the Amendment itself." *Bram vs. United States*, 168 U. S. 532, 543, 42 Law Ed. 568, 573-574.

Hence, in this court, evidence which the accused has been compelled to manufacture against himself by actions stands on the same footing of incompetency as evidence which he has been compelled to manufacture against himself by statements. Yet in the case at bar, the trial Judge excluded statements made by the accused under duress but admitted testimony which he had been compelled to manufacture against himself at the same time.

In *Walker vs. State, supra*, it was pertinently argued that if such testimony was admitted, a defendant on trial for forgery could be compelled to write his name to be used as evidence against himself; in *State vs. Ah Chuey, supra*, the dissenting opinion contains a similar argument and so we ask in this case if the defendant could be compelled to put on the coat and the result of that action used against him, why did the court instruct the witness, Doctor Porter, who said

that the defendant "was asked if he recognized it," to "omit the conversation entirely." (R. 41.) What particular virtue lies in the organs of speech that a person should be protected against their treason if he may be betrayed by the organs of motion? Why were the fathers so careful to guard against infringement of a man's liberty by effectually stopping his mouth and yet leave him helpless against a similar tyranny over his hands? If the constitutional provision is thus to be whittled away, the principle adopted by the trial court would be equally effective upon the written confession; but we apprehend that the trial court would illogically have denied the competency of evidence resulting from the application of the hands of the accused to the piece of paper while admitting the competency of evidence resulting from the application of his arms to a piece of cloth.

In fine, if the defendant can be compelled to put on the coat to furnish evidence that it is his, why can he not be compelled to say it is his coat?

## ERROR IN INSTRUCTING THE JURY.

Embraced in this point are assignments of error Nos. 32, 33, 34, 35, 36, 37 and 38. (R. 78, 79, 80.)

No. 32. The court erred in using the following language in instructing the jury that the defendant is presumed to be innocent: "Not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted; that the evidence must overcome the legal presumption of innocence."

No. 33. The court erred in instructing the jury: "Do not misunderstand the phrase 'reasonable doubt' as being the same thing or synonymous with any kind of a doubt, or that the phrase or principle means that the Government is placed in the situation of having to do an impossible thing, of establishing the guilt of an accused person to an absolute moral certainty."

No. 34. The court erred in refusing to give the instruction on the presumption of innocence, as requested by the defendant, in the following words: "The prosecution must prove beyond a reasonable doubt every material allegation of the indictment as therein charged. Nothing is to be presumed or taken by implication against the defendant. He is presumed to be innocent until his guilt is established beyond a reasonable doubt by competent and sufficient evidence. The presumption of innocence starts with the charge at the beginning of the trial and goes with him until the determination of

the case. This presumption of innocence is evidence in the defendant's favor, and should be so considered and weighed by you in determining the verdict you render in this case. To the presumption that the defendant is innocent you should add all the evidence in his favor and weigh this with the evidence against him, and then, unless you shall find the defendant guilty beyond all reasonable doubt, you will acquit him."

No. 35. The court erred in refusing to give the instruction on reasonable doubt requested by the defendant in the following words: "Areasonable doubt, as the term is employed in the administration of criminal law, is an honest, substantial misgiving, generated by the evidence, or want of it. It is such a state of the evidence as fails to convince your judgment and conscience and satisfy your reason of the guilt of the accused. If the whole evidence, when carefully examined, weighed, compared, and considered, produces in your mind a settled conviction or belief of the defendant's guilt, such an abiding conviction as you would be willing to act upon in the most weighty and important affairs of your own life, you may be said to be free from any reasonable doubt, and should find a verdict in accordance with that conviction or belief. If there is any one single fact proved to the satisfaction of the jury by preponderance of the evidence which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant."

No. 36. The court erred in instructing the jury on reasonable doubt, as follows: "Now, the term 'reasonable doubt' is to be understood by the jury as being an actual, substantial doubt left in your minds that you are conscious of after having given the testimony consideration, and such a doubt as a reasonable person might entertain, and such a doubt as a reasonable person, acting honestly and candidly, would be influenced by where he is acting in a matter of great importance in his personal affairs. Do not misunderstand the phrase 'reasonable doubt' as being the same thing or synonymous with any kind of a doubt, or that the phrase or the principle means that the Government is placed in the situation of having to do an impossible thing, of establishing the guilt of an accused person to an absolute moral certainty. As I have said, the term 'reasonable doubt' is to be understood in the ordinary meaning and acceptation of those two words coupled together, qualifying each other. If after giving this case a full and candid consideration you feel that you are fully convinced that the Government has made out its case and proved that the defendant is guilty, and when you have deliberated on it and feel that you have left no substantial doubt in your minds, or not such a doubt as would influence a reasonable person act-

ing with honesty and with a firm purpose to do right, then your verdict should be that the defendant is guilty as charged in the indictment. But if, on the other hand, although the evidence preponderates against him and raises a probability that he is guilty, if you feel in your minds that you have a substantial reasonable doubt, it is your duty to give the defendant the benefit of that doubt and return here a verdict of not guilty."

No. 37. The court erred in instructing the jury on their return for additional instructions, as follows: "Reasonable doubt is an actual doubt that you are conscious of, after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit. In the explanation of the rule which I gave in the general instructions to this jury I endeavored to refute the theory which sometimes prevails with jurors in criminal cases that any mere possibility may constitute sufficient ground for a reasonable doubt upon which the decision of a case may be based. The law does not contemplate bare possibilities, but does regard actual things. Jurymen should not be controlled by any fantastic theory, but in the performance of jury service you should decide controversies as you would any important question in your own business affairs."

No. 38. The court erred in refusing to add in his additional instruction to the jury the words requested by the defendant: "That if they shall find one fact established by a preponderance of the evidence which is inconsistent with the guilt of the defendant, that will be sufficient to raise a reasonable doubt, and they should acquit him."

The instructions to the jury of which complaint is made occurred on the 21st day of December, 1908. The jury retired that afternoon and about ten o'clock the next morning returned to the court, whereupon the foreman of the jury asked this question:

FOREMAN: There is a doubt in the minds of some of the jurymen. Are we at liberty to ask a question?

THE COURT: Yes; you may indicate to me any matter concerning which you desire instructions from the court.

A JUROR: The question in doubt was what constitutes a reasonable doubt AS STATED IN YOUR CHARGE TO THE JURY (R. 61).

The court will see that the statements of the trial judge to the jury in defining to them the term "reasonable doubt" do not all occur in the same place, nor in one paragraph. He defined reasonable doubt in an instruction which related also to circumstantial evidence (R. 58). Following this was an instruction on the presumption of innocence (R. 58 and 59). Then came another instruction defining reasonable doubt. After the request by the juror the court then gave an additional instruction defining reasonable doubt (R. 61) but refused to add to that instruction an application of the definition to a case where, as here, the evidence was purely circumstantial (R. 62). The instructions are complained of on the following grounds:

Defendant's requested instruction on reasonable doubt (R. 60) defined it as one "generated by the evidence or want of it" but at no place in the instructions given by the court is the jury told that a reasonable doubt in their minds, the existence of which would require a verdict of "not guilty," could be generated by a want of evidence.

Defendant also complains of the failure of the court on the return of the jury to define reasonable doubt in such manner that the definition would be applicable in a case where the evidence was purely circumstantial. When the jurors returned and requested additional instructions on the point the situation in this particular approached a similar situation in *State vs. Pilling* (1909), 53 Wash. 464, 102 Pacific 230. In that case the Supreme Court of Washington said: "The instruction was dis-associated from the rest, and the very fact that the jury desired further instructions would indicate that they did not understand or remember the charge already given." If the jury in this case, as is demonstrated by their request, did not remember the instruction which the court had previously given and if, where the evidence is purely circumstantial and a proper request is made, the court must instruct on reasonable doubt as applied to a case where the evidence is purely circumstantial, then the failure of the court so to instruct on the return of the jury was prejudicial error notwithstanding that he may have fully instructed them on that point in his original charge.

But the real vice in the failure of the court to instruct the jury fully upon the question of reasonable doubt in the same language which he had used in his original charge, lay in the following facts: First. The court will note that the question in the minds of the jurors upon their return to the court room was not "what is reasonable doubt," but the question as asked by the particular juror was "what constitutes reasonable doubt AS STATED IN YOUR CHARGE

TO THE JURY?" It is impossible for us to put in the record the materiality of this question as learned by us from conversation with the juror in particular, but we believe that it is not only legitimate but our duty to use the facts so learned as an illustration and the court is asked to consider it solely in that light. Assuming then that the jury upon retiring stood six for acquittal and six for hanging and later eight for acquittal and four for hanging and that those jurors, or some of them, who stood for acquittal urged upon the others in substance that the court had said, which he had, that: "If there is any one single fact proved to the satisfaction of the jury by preponderance of the evidence which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant." (R. 58.)

These jurors who did not remember this instruction were, we will say, skeptical and the other juror, to satisfy the others upon this point, had the foreman take the jury before the court and he then asked the court to repeat "What constitutes a reasonable doubt *as stated in your charge to the jury?*" (R. 61.)

Instead of repeating the definition as previously given, the court undertook to define, brefly, "reasonable doubt," independent of his former instruction, adding the following statement:

"In explanation of the rule which I gave in the general instructions to this jury I endeavored to refute the theory which sometimes prevails with jurors in criminal cases that any mere possibility may constitute sufficient ground for a reasonable doubt upon which the decision of a case may be based. The law does not contemplate bare possibilities, but does regard actual things. Jurymen should not be controlled by any fantastic theory, but in the performance of jury service you should decide controversies as you would *any* important question in your own *business affairs.*" (R. 61.)

We believe there can be little doubt but that the instruction which we have just quoted indicates the impatience with which the learned trial judge viewed the doubt which seemed to be in the minds of the jurors, thus delaying their verdict and then when counsel for plaintiff in error reminded the court that this was a case of circumstantial evidence and requested him, in effect, to repeat that portion of his original charge which instructed the jury that if they should find one fact established which was inconsistent with the guilt of the defendant that that would be sufficient to raise a reasonable doubt, the court refused to do so. (R. 62.)

It is significant that when the jury then retired that after a short absence they returned with a verdict of "guilty without capital punishment."

Defendant also complains of the statement of the court in his original charge that the Government was not "placed in the situation of having to do an impossible thing, of establishing the guilt of an accused person to an absolute moral certainty." This statement, we contend, is misleading. Under all the decisions in which the terms "moral certainty" and "absolute certainty" are used, the courts hold that "moral certainty" is synonymous with proof beyond a reasonable doubt but that the Government is never required in a criminal case to prove the charge to an "absolute certainty." The trial court, however, told the jurors that the Government was not under the necessity of establishing guilt to an absolute moral certainty. This is a contradiction in terms. They did not have to do one, but they did have to do the other, and the instruction is so misleading that we contend its giving was error.

Defendant also complains of the instruction last given to the jurors in that the court instructed them that if they "believed" that they were acting in a reasonable manner they had no reasonable doubt. The balance of the sentence in which the statement occurs we believe would not have been error had the court instructed the jury that if they had a "conviction" that they were acting in a reasonable manner, etc., they should convict. This contention finds support in *Hopt vs. Utah*, 120 U. S. 430, 30 Law Ed. 708, 712, in which this court say: "But an illustration like the one given in this case, by reference to the conviction upon which the jurors would act in the weighty and important concerns of life, would be likely to aid them to a right conclusion when an attempted definition might fail."

In line with that statement of this court the requested instruction on reasonable doubt which the court refused to give for the defendant contained the element that the condition of mind in the illustration mentioned by the court in *Hopt. vs. Utah* should be "an abiding conviction." A brief on the authorities on this question is beyond our power. One of the best reasoned cases we have discovered is *Lovett vs. State*, 30 Florida 142, 17 L. R. A. 705, 11 Southern 550.

The illustration has been criticised on the ground that men sometimes act in weighty affairs when they have not that information before them which produces a conviction beyond a reasonable doubt of the correctness of that action. We believe that the supplementary charge of the court is subject to that criticism, which would have been obviated had the court used the language above quoted from *Hopt vs. Utah*, and had

the illustration contained the element that the testimony should produce in the mind of the jury a "conviction" or an "abiding conviction" such as reasonable men with a desire to act honestly would be influenced by in their most weighty personal concerns. We have found no case in which the court instructed the jury that they need or need not find the guilt of the accused "to an absolute moral certainty," consequently we have no case on all fours deciding whether that phase of the instruction is subject to criticism for uncertainty but there are many cases holding the phrase "moral certainty" to be equivalent to the phrase "reasonable doubt."

*Miles vs. U. S.*, 103 U. S. 304, 312, 26 L. Ed. 481, 484.
*Cerovich vs. U. S.*, 205 U. S. 86, 92, 51 L. Ed. 722, 724.
*Commonwealth vs. Webster*, 5 Cush. 320.
*Fowler vs. State*, 100 Alabama, 96, 97.
*Jones vs. State*, 100 Ala. 88.
*Carleton vs. People*, 150 Ill. 181.
*Commonwealth vs. Costley*, 118 Mass. 1.
*Territory vs. Owings*, 3 Mont. 137.
*People vs. Smith*, 105 Cal. 676.
*People vs. Ferry*, 84 Cal. 31.
*State vs. Whitson*, 111 No. Carolina, 693.
*Hornsby vs. State*, 94 Ala. 55.
*People vs. Cheon Foon Ark*, 61 Cal. 527.
*Loggins vs. State*, 32 Tex. Crim. Rep. 364.

It is also well established that guilt need not be proven to an "absolute certainty."

*Commonwealth vs. Webster*, 5 Cush. 320.
*U. S. vs. Barrett*, 65 Fed. 62, 67.
*Welsh vs. State*, 96 Ala. 93.
See note to *Rippey vs. Miller*, 62 Amer. Decisions 184.

While, therefore, we have no case directly in point, it will readily be seen that the statement of the court was so misleading as to be unintelligible.

Another error in the instruction, that of the failure of the court to instruct the jury that a reasonable doubt might be engendered by the want or lack of evidence is established by a uniform current of authority. The only difference of opinion among judges seems to be whether the error is sufficient to call for reversal. In the following cases a new trial was granted because of this error:

*Hale vs. State* (1894) 72 Miss. 140, 16 So. 387, 390. Woods, J. "The ninth instruction given for the state is not free from objection. A reasonable doubt may arise from want of evidence as well as out of the evidence. Reversed and remanded."

*Densmore vs. State* (1879), 67 Ind. 306, 33 Amer. Rep. 96, Worden, J. "It is thus seen that according to the charge, it is the 'proof made,' or 'evidence adduced' that is the foundation of a reasonable doubt. This excludes all reasonable doubts that may arise from the lack or want of evidence. The state may make out a case, *prima facie*, beyond a reasonable doubt, but the defendant's evidence may be such as to raise a reasonable doubt of his guilt. The charge may have been drawn with a view to such case. But on the other hand, the lack of evidence on the part of the state may leave a reasonable doubt as to the defendant's guilt. And it is not the law, as we think, that a reasonable doubt may not be raised upon the conjecture of the defendant's innocence, though there is nothing in the 'evidence adduced' that furnishes a foundation for suggestion of the conjecture. The evidence adduced may have no tendency whatever to show the defendant's innocence, anl yet may utterly fail to establish his guilt." Reversed.

*Wright vs. State* (1879), 69 Ind. 163, 35 Amer. Rep. 212, Niblack, J. "So much of the instructions above set out as limited a reasonable doubt to something which is suggested by, or arises from, or springs out of, the evidence adduced gave, what appears to us to have been a too narrow definition of that which is implied by a reasonable doubt. A reasonable doubt may arise from the want of evidence as to some fact having a natural connection with the cause. It has reference to that uncertain condition of the mind which may remain after considering what has not been proven as well as that which has." Reversed.

*State vs. Andrews* (N. J. Law, 1908), 71 Atlantic, 109. This was a conviction for forgery. Defendant requested a charge that "if the jury have a reasonable doubt as to whether the defendant altered or endorsed the paper, or as to whether it was done before or after handing it to Heston, there must be an acquittal." The court gave this instruction and of its own motion added: "Your reasonable doubt as to whether it was before or after must be founded upon some evidence that was presented in this case, if there is a reasonable doubt." Holding the court's amendment to the charge to have been reversible error, Trenchard, J., speaking for the court says: "We are constrained to think that this response of the court did

not declare the rule of law which under the circumstances the defendant was entitled to have charged to the jury. The accused was entitled to be acquitted if the jury, because of the state of the proofs, as to any fact necessary to conviction, had a reasonable doubt of the defendant's guilt. A doubt, to be reasonable, must arise out of the evidence or want of evidence, after a full consideration by the jury of all the evidence in the case. 23 Amer. & Eng. Enc. of Law (2nd Ed.) 966. As already shown, one fact necessary to be found was that the alleged acts were done before the paper was signed by Heston and the jury may have lawfully considered that there was no evidence to establish that fact. Under these circumstances, the instruction that the reasonable doubt must be one founded on some evidence that was presented in the case was erroneous, as it excluded the reasonable doubt that may have arisen from the lack or want of evidence." Reversed.

We have found three cases which hold that the failure to instruct that a reasonable doubt may arise from the lack of evidence as well as from the evidence itself was error, but the courts have not considered that error of itself sufficient to call for reversal.

*Mackey vs. The People* (1873), 2 Colo. 13, 18.
*Brown vs. State* (1886), 105 Ind. 385, 5 N. E. 900, 903.
*Governor vs. State* (Georgia 1908), 63 S. E. 241.

But the failure to instruct that a reasonable doubt could be generated by the want of evidence appears to us so plainly error in a case depending solely upon circumstantial evidence that we fail to see how it can have been otherwise than highly prejudicial. Circumstantial evidence derives its cogency from the law of probabilities. It is possible that incriminating circumstances may exist, indeed, there are cases where they have existed and have been of such weight and numbers as to satisfy the mind of the guilt of the accused, beyond a reasonable doubt, yet they may have been mere coincidences and may not have been in the chain of cause and effect connecting the accused with the corpus delicti. In evidence of this character a reasonable doubt necessarily arises as much from a lack of evidence as it does from the evidence adduced. If there are exculpatory circumstances then the jury, in considering them, will determine from the evidence whether guilt has been established beyond a reasonable doubt, but the defendant is just as much entitled to the benefit of that doubt in a case where the circumstances, though of an incriminating nature, fail to convince the mind to that certainty which the law re-

quires, and the failure of the court so to instruct the jury was highly prejudicial to the defendant.

Turning to the next error urged, namely, the refusal of the court to include in his supplemental instruction an application of the law on circumstantial evidence to his definition of a reasonable doubt, we find a statement by this court which indicates the favor in which the refused instruction stands with the judges.

"The instruction in the case before us is as just a guide to practical men as can well be given; and if it were open to criticism it could not have misled the jury, when considered in connection with the further charge, that if they could reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence, they should do so, and in that case find him not guilty."

*Hopt vs. Utah*, 120 U. S. 430; 30 Law Ed. 708, 712.

If the expression quoted above stands in such high favor with this court that the court regard it as capable of curing an instruction which possibly would otherwise have been erroneous, we feel less hesitation in urging that it should have been given by the court in this case, and in view of the position taken by this court we need cite but few authorities to sustain our contention that some such expression should have been used by the court in his supplemental instruction when the jury in so many words asked for a definition "AS STATED IN YOUR CHARGE TO THE JURY." The record showing that the court had used the expressions which he refused to give again, this request of the jury was a request for its repetition. The record showing that the jury had forgotten the original charge, the Government cannot urge the court's former statement as curing his subsequent refusal to charge.

*Hamilton vs. State* (1895), 96 Georgia, 301; 22 S. E. 528.

Head note by the court: "When, in the trial of a criminal case, the evidence against the accused was entirely circumstantial, it was the duty of the judge, not only to charge upon the law of reasonable doubt, but also, whether requested or not, to state to the jury the rule usually applicable in such cases, to the effect that the evidence must connect the accused with the perpetration of the alleged offense, and must not only be consistent with his guilt, but inconsistent with every other reasonable hypothesis."

LUMPKIN, J:

"It would be easy to cite authorities in great number sustaining the doctrine announced in the head-note, but we are sure it will be accepted as good law without further support. Judgment reversed." Accord: *Hart vs. State* (1895), 97 Georgia 365, 23 S. E. 831.

*People vs. Bonifacio*, (1907), 190 N. Y. 150, 82 N. E. 1098, 1100.

Gray, J.: "The further reason for denying the request, beyond its technical inaccuracy, is this, that it is one more properly made in a case wholly depending upon circumstantial evidence and was quite inappropriate to the facts proved.

In *People vs. Bennett*, 49 N. Y. 137, a case of circumstantial evidence, Chief Judge Church laid down the rule that 'in determining a question of fact from circumstantial evidence, there are two general rules to be observed: (1) The hypothesis of delinquency, or guilt, should flow naturally from the facts proved to be consistent with them all. (2) The evidence must be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him.' In *People vs. Fitzgerald*, 156 N. Y. 253, 50 N. E. 846, also a case of circumstantial evidence, Judge O'Brien laid down the same rule, using Chief Judge Church's language."

*Territory vs. Lermo* (1896), 8 N. M. 566, 46 Pac. 16, 18, Laughlin, J.: "We are further of the opinion that, inasmuch as the evidence in the case was wholly circumstantial, the jury should have been instructed to the nature and conclusiveness of that character of testimony to warrant a conviction upon it. *Struckman vs. State*, 7 Tex. App. 581; *People vs. Phipps*, 39 Cal. 326." Reversed.

*Wantland vs. State* (1896), 145 Ind. 38, 43 N. E. 931.
*Banks vs. State* (Ind. 1901), 60 N. E. 1087, 1092.

Defendant also assigns as error the failure of the court to supplement his additional instruction by the one requested by himself (R. 62) to the effect that if they found one fact established by a preponderance of the evidence, which was inconsistent with his guilt, that would be sufficient to raise a reasonable doubt and they should acquit him. Substantially this principle is announced by the following authorities:

*Burrill Circumstantial Evidence*, Sec. 136.
*Walker vs. State*, (Ala. 1908), 45 So. 640.
*Simmons vs. State*, (Ala. 1909), 48 So. 606.
*People vs. Dole*, (1898), 122 Cal. 486; 55 Pac. 581, 585; 68 American State Rep. 50.
*Howard vs. State*, (1895), 108 Ala. 571, 18 So. 813, 816.

The expression that in a case depending upon circumstantial evidence alone, the finding of one fact inconsistent with the defendant's guilt is sufficient to raise a reasonable doubt, has been criticised but we contend that it is good law. As we have before urged, the force of circumstantial evidence is derived from the law of probabilties. If that evidence is of such character as to amount to a mathematical demonstration, then the doctrine of reasonable doubt has no application. If, however, the evidence does not amount to a mathematical demonstration, there is always a possibility that the incriminating circumstances may be mere coincidences and not bound to the principal fact by a chain of cause and effect; and manifestly, if the jury find one fact which is inconsistent with the theory that the circumstances are so bound in that chain of cause and effect, the incriminating facts must of necessity dwindle into coincidences and under such circumstances the jury are bound to have a reasonable doubt. The expression has been citicised on the ground that it directs the attention of the jury to one phase of the evidence alone. It is urged that instead of this expression there should be stated that the hypothesis of defendant's guilt must be a reasonable one and that the facts must not be inconsistent with any reasonable hypothesis of his innocence, but it is manifest that in determining whether or not the one hypothesis is reasonable and the other one unreasonable one material fact may be all that is necessary to determine that issue and if the jury has found that fact the issue is decided and the case at an end.

The instruction of the learned trial court on the presumption of innocence was misleading when he said: "Not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted; that the evidence must overcome the legal presumption of innocense." We contend that the presumption of innocence is "an absolute rule." It is not merely a "principle upon which prosecutions are conducted," and language which might give the lay mind an idea that it was just another abstract legal idea instead of a rule, violation of which could only occur under their perjury, was misleading.

## PERMITTING JURY TO SEPARATE.

This error is predicated upon assignment of error number forty-three, which is as follows (R. 80):

Forty-third. The court erred in permitting the jury to separate and associate with whomsoever they chose, after being sworn to try the case and prior to their retiring to consider their verdict.

The record shows no request by counsel for plaintiff in error, that the jury should not be permitted to separate after being sworn to try the case. There was no express consent by the prisoner, however, that they might separate. In view of the unique procedure in the trial below there could be, for the following reason, no voluntary consent implied:

The trial court stated at the very threshold of the trial (R. 23, bottom):

"* * * I am unwilling to exclude the jury from any part of the proceedings in this trial."

(R. 39, bottom): "I am not going to send the jury out during any part of this trial."

It was therefore impossible for counsel for plaintiff in error to object to the separation of the jury and request that they be placed in the custody of an officer and prevented from going to their respective homes during the progress of the trial, unless such objection and request were made in the presence of the jury.

To compel such a request to be made in the presence of the jury, thereby invoking the displeasure and prejudice of some juror is unjust to the accused in that it would tend to deprive him of a fair trial; such a requirement would be improper practice.

*State vs. Holedger*, 15 Wash. 443, 46 Pac. 652.
*State vs. Parker*, 25 Wash. 405, 65 Pac. 776.
*Peiffer vs. Com.*, 15 Pa. 468, 53 Am. Dec. 605.

As said in *Peiffer vs. Com., supra*, "Who dare refuse to consent, when the accommodation of those in whose hands are the issues of his life or death are involved in the question?"

We believe the language of the court in *State vs. Parrant*, 16 Minn. 178 (Gil. 157), to be appropriate in this connection:

"We need not inquire whether the defendant could have waived the objection thus arising for he has not attempted to do so. His consent was not asked, and that he did not object

is therefore no evidence that he assented. For the aforesaid error in law the verdict must be set aside."

It is true that in the preceding case decided in 1871 the separation complained of was after being charged by the court and immediately upon their return they retired to consider their verdict, and the reversal was pretended to be based upon a statute requiring that after the charge they should retire for deliberation in the custody of an officer who was to keep them together. The decision also recognizes that in the earlier case of *Bilansky vs. State*, 3 Minn. 427 (Gil. 313), decided in 1859, it had been established as the law in Minnesota, without statute, that it was not error for the jury to separate during the progress of a trial. It would seem that in this Minnesota case that without statute, no distinction was made between a separation before or after retiring to consider of their verdict.

But see *Maher vs. State*, 3 Minn. 444 (Gil. 329).

Other courts take what we believe to be a sounder position, and hold that under the common law no separation of a jury can be permitted in a capital case. These will be considered presently.

The separation in the case at bar, of which complaint is made, was no technical, momentary or unavoidable separation, as shown by the affidavit in support of a motion for new trial, in part as follows (R. 66):

"That a jury was sworn on December 11, 1908, to try the defendant upon the indictment herein; that said jury so sworn did thereafter hear the evidence and render the verdict herein on the 22nd day of December, 1908, as shown by the record; that on the afternoon of Friday, December 11th, 1908, the court adjourned until Tuesday, December 15th, 1908, at 10 o'clock in the morning, and on the afternoon of Friday, December 18th, 1908, after the evidence of both prosecution and defense was all in, the court adjourned until ten o'clock in the morning of Monday, December 21st, 1908, for argument by respective counsel and instruction by the court; that from the time said jury was sworn to try said case until they retired to consider their verdict, each and every one of the members of said jury was permitted to separate from the other members thereof;

"That on the 5th day of January, 1909, in the corridor of the building in which this court is held, affiant was informed by James Doran, one of said jurors, that he, the said Doran, being then and there a juror sworn to try this

case, repaired to his home in Skagit County, State of Washington, and while there between the dates of adjournment last aforesaid, and while the trial of this case was still pending, engaged in conversation with one of his hired men on his, the said Doran's farm, and that during said conversation the trial of this case was referred to and discussed to some extent by the said hired man and the said juror, Doran.

"That there was no restraint whatever placed upon any of said jurors by the court as to where they should or should not go during said trial, and no restraint whatever was placed upon any of said jurors as to whether they should or should not read the daily newspaper accounts of this trial while the same was pending and before the verdict herein was rendered." (Then are set out four newspaper articles reciting sensational, prejudicial and incomplete phases of the trial with comments thereon, and averring that two jurors, named, admitted reading newspaper accounts of the trial as the same progressed, but refused to make an affidavit to that effect; that one of said jurors expressed a willingness to state under oath before the court that he had read newspaper accounts of the trial.)

The bill of exceptions then recites (R.72):

"The court refused to permit the filing of counter affidavits to show whether or not the jurors mentioned in said affidavit of Hugh M. Caldwell did read said papers, but ruled on said motion on the assumption that said jurors had read the newspaper articles therein set forth. The Government filed the affidavit of James Doran, one of said jurors, which last mentioned affidavit contained no statements controverting or denying any statements in the said affidavit of Hugh M. Caldwell, except that said Doran stated that he had not during any part of the trial of said case conversed with anyone about said case or about the issues involved therein. Said affidavits of Hugh M. Caldwell and James Doran were the only affidavits filed by the parties or considered by the court in deciding said motions."

The court below in disposing of this point said (R. 10):

"The first of the three motions is upon the ground that the trial was prolonged through a number of days and at each adjournment and recess of the court previous to the final submission of the case to the jury, the jurors were permitted to separate, and they were free to read, and did read, the daily newspapers, in which the case was referred to and commented upon in a manner prejudicial to the defendant's

case. * * * the court admonished and advised the jurors *to be careful to not give heed to unreliable statements published by the papers*, and on such occasion of adjournment the court admonished the jurors to refrain from talking about the case or any subject connected with it, either with each other or with any person, and to not listen to anything which might be said about the case out of court and to not have any communication on any subject whatever with the parties, witnesses or attorneys in the case, and to avoid *as far as possible* receiving any impression as to the merits of the case other than what should be made upon their minds by the proceedings on the trial. There is no reasonable ground for supposing that either of the jurors failed to faithfully observe these instructions. * * *

(R. 16). I deny that in order to be fair towards an accused person whether he be in fact guilty or innocent, it is necessary *or proper* to imprison jurors as if they were culprits, * * *"

It will therefore be observed that, in the case at bar, the learned trial court decided this proposition not upon the ground that the plaintiff in error consented to the separation or that he failed to object, either in or out of the presence of the jury, to their separation, but upon the broad ground that it is not "necessary or proper to imprison jurors as if they were culprits." It is obvious, therefore, that any request by plaintiff in error that the jury be not permitted to separate, would have been a vain and useless thing under not only the action of the learned trial court, but likewise his express and unmistakable words. That a court will not, as a condition precedent to granting relief, require a party to do a vain and useless thing, is elementary, and we can observe no reason why it is not applicable in this connection.

By the weight of authority, it is held that after the jury has separted in a murder trial, the burden is upon the prosecution to show that the defendant has not been prejudiced thereby.

*Coker vs. State*, 20 Ark. 53.
*Frame vs. State*, 73 Ark. 501, 84 S. W. 711.
*Ince vs. State*, 77 Ark. 418, 88 S. W. 818.
*People vs. Brannigan*, 21 Cal. 337.
*People vs. Symonds*, 22 Cal. 348.
*People vs. Maughs*, 149 Cal. 253, 86 Pac. 187.
*Gamble vs. State*, 44 Fla. 429, (60 L. R. A. 547, 103 Am. St. Rep. 150), 33 So. 471.
*Bird vs. State*, 18 Fla. 493.
*Barrow vs. State*, 80 Ga. 191, 5 S. E. 64.

*Creek vs. State*, 24 Ind. 151.
*French vs. Com.*, 100 Ky. 63, 37 S. W. 269.
*Thacker vs. Com.*, 23 Ky. L. Rep. 745, 63 S. W. 737.
*Green vs. State*, 59 Miss. 501.
*Cartwright vs. State*, 71 Miss. 82, 14 So. 526.
*State vs. Orrick*, 106 Mo. 111, 17 S. W. 176, 329.
*State vs. Sansone*, 116 Mo. 1, 22 S. W. 617.
*State vs. Shaeffer*, 172 Mo. 335, 72 S. W. 518.
*State vs. Howell*, 117 Mo. 307, 23 S. W. 263.
*Caw vs. People*, 3 Neb. 357.
*Roper vs. Ty.*, 7 N. M. 255, 33 Pac. 1014.
*Com. vs. Eisenhower*, 181 Pa. 470, 37 Atl. 521, 59 Am. St. Rep. 670.
*Com. vs. Cressinger*, 193 Pa. 326, 44 Atl. 433.
*Com. vs. Williams*, 209 Pa. 529, 58 Atl. 922.
*Stone vs. State*, 4 Humph. 27.
*Hines vs. State*, 8 Humph. 597.
*Cartwright vs. State*, 12 Lea 620.
*People vs. Shafer*, 1 Utah 260.
*Phillips vs. Com.*, 19 Gratt. 485.
*Keenan vs. State*, 8 Wis. 132.
*Rowan vs. State*, 30 Wis. 129, 11 Am. Rep. 559.
*State vs. Dolling*, 37 Wis. 396.
*Hempton vs. State*, 111 Wis. 127, 86 N. W. 596.
*State vs. Harrison*, 36 W. Va. 729, 18 L. R. A. 224, 15 S. E. 982.

But in the States of Arkansas, Illinois, and Texas it has been held that it is incumbent upon the defendant to show that he has been prejudiced by the separation.

*Reeves vs. State*, 84 Ark. 569, 106 S. W. 945.
*Reins vs. People*, 30 Ill. 256.
*Adams vs. People*, 47 Ill. 376.
*Gott vs. People*, 187 Ill. 249, 58 N. E. 293.
*Marzen vs. People*, 190 Ill. 81, 60 N. E. 102.
*Ogle vs. State*, 16 Tex. App. 361.

In *Reeves vs. State, supra*, the statute of Arkansas authorized the trial court to permit the jurors to separate. It was held that where the court exercised its discretion, so conferred, the burden is upon the defendant to show that they were improperly influenced.

In *Reins vs. People, supra,* the defendant and prosecution agreed that a sealed verdict might be rendered and the jury separate; this was done, and no showing was made of any improper influence being exerted upon the jury during their separation.

In *Adams vs. People, supra,* there was no separation of the jury, but it was alleged that the jurors heard comments upon the street and while at meals at the hotel. The court designates as indiscreet, the action in permitting the jury to eat with other persons; it was held that it must be shown that the exposure operated in some way to the prejudice of the prisoner, or the verdict would not be set aside.

In *Gott vs. People, supra,* some of the jurors went to a barber shop and were shaved; others went home and procured their overcoats. The court held the conduct of the officers in permitting this to be reprehensible, but since none of the jurors was out of sight of the bailiffs, it was held that in the absence of a showing of prejudice the verdict would not be disturbed.

In *Marzen vs. People, supra,* one of the jurors became ill and was attended at the hotel by physicians, his wife and a woman friend, while the other jurors were permitted to walk about for exercise in charge of an officer. There was no affidavit even intimating that the sick juror was not attended by a sworn officer, or that anything improper or prejudicial to the cause of the plaintiff in error occurred. In the absence of any such showing the verdict would not be disturbed.

A prisoner ought not to be asked in a capital case, to consent to a separation of the jury, nor should such consent be implied; he is not in a situation to exercise a fair choice but may consent for fear that his refusal may prejudice the jury against him. It would seem, therefore, that in a capital case, any separation of the jury, with or without the prisoner's consent, from which they might have been subject to improper influences, vitiates the verdict and a new trial should be granted.

*People vs. Shafer,* 1 Utah 260.
*Woods vs. State,* 43 Miss. 364.
*Early vs. State,* 1 Tex. App. 248, 28 Am. Rep. 409.
*Peiffer vs. Com.,* 15 Pa. 468, 53 Am. Dec. 605.
*State vs. Collins,* 81 Mo. 652.
*McCampbell vs. State,* 37 Tex. Crim. Rep. 607, 40 S. W. 496.

*State vs. Craighead*, 114 La. 84, 38 So. 28.
*State vs. Parrant*, 16 Minn. 178 (Gil. 157).

In *Woods vs. State, supra*, counsel for defendant expressly consented to a separation of the jury, and the court said:

"It is of the utmost importance to the administration of justice, that the purity of the trial by jury should be preserved. And time and experience have shown the wisdom of the common law, which forbids the separation of a jury in the trial of a capital case before they have been discharged of the prisoner, and an adherence to which, modified as it has been in some of its harsh features, by modern practice, is best calculated to effect that end. Departures from the common law rule in capital cases, should be as few as possible, and only allowed in extreme cases, and never for the comfort or convenience of the jurors. For if this were allowed, it is not too much to say that few influential culprits would ever be convicted, and that few friendless ones, pursued by powerful prosecutors, would escape conviction. Jurors are as open to prejudice from persuasion as other men; and neither convenience, comfort nor economy ought to be consulted, in order to guard against it. When selected to perform the important duties of jurors, they are withdrawn from the crowd, and must, necessarily, be subjected to some wholesome legal restraints for the purpose of guarding them against improper influences, and to secure that confidence in the honesty and purity of their action, so essential to the administration of justice. Let them have every comfort compatible with their duties; but let them not be exposed to the influence of those who might pervert their judgment. The stream of criminal justice should be kept as pure as possible, and not be thus exposed to the chances of pollution from extraneous influences."

In the case of *Hare vs. the State*, 4 How. 187, Chief Justice Sharkey, in delivering the very able and lucid opinion of the court in that case, says: "If the verdict be given under circumstances which might conduce to an improper influence, or the natural tendency of which might be to produce bias or corruption, it cannot then be said to be above suspicion; and if it be not, it must fall short of that perfection which the law requires, and which, under a more guarded administration, it is capable of producing. It is not necessary that an attempt should be made to bias the minds of the jurors, or that any pernicious influence should be exerted. The door to tampering is to be closed. This is the only security. For

if it be left open, it may be predicted with certainty, that the evil consequences will fall somewhere. If the purity of the verdict might have been affected, it must be set aside. A verdict on which doubts might rest, cannot be good. It must command entire confidence. And this is the doctrine of the cases of the *Commonwealth vs. McCaul*, 1 Virginia Cases, 271; and *McLain vs. the State*, 10 Yerger (Tenn.) 241, (31 Am. Dec. 573). In neither of these cases of Hare, McCaul, and McLain, was any such thing as tampering with the jury shown, and the courts held that to be unnecessary, and say that it is sufficient that they might have been subject to improper influences. In order to maintain the purity and integrity of this species of trial, great care and precaution on the part of the courts should be observed to guard the jury against improper influences; and the more effectually to do this, we hold the only safe practice to be to regard the separation of the jury, even by the permission of the court, during the trial of a capital case, either with or without the consent of the prisoner, except in a case of great necessity, or the separation of any of the jurors from their fellows during the progress of the trial, without being attended by a proper sworn officer, to be conclusive evidence of such an irregularity as will vitiate the verdict and render a new trial necessary.

In the case of *Organ vs. The State*, 26 Miss. 83, the court says: "If any separation is to be allowed, without incurring the imputation of irregularity, for what length of time and for what purpose may it be? How frequently may it be practiced, and to what distance may it extend? By what means are communications between the jurors and other persons, which may take place, and which must necessarily be secret, to be disclosed? These considerations show the dangerous uncertainties to which such a loose practice would lead, and the soundness of the rule above indicated, that every such separation should be considered as absolutely and conclusively vitiating the verdict. The doctrine that in such cases the verdict would only be *prima facie* vicious, and open to explanation, would lead to an inquiry as to the effect of the communications between the jurors and other persons which would necessarily imply a sort of impeachment of their conduct, from which they would naturally endeavor to exculpate themselves, by attempting to show that those communications had no influence in procuring the verdict. The statements of the juror, who would so far disregard the obligations of his oath, and the duties which, as a citizen, he owes to the community in which he lives, as to permit himself to be tampered with, and of the person who is capable of tampering with him, must be received with many grains of allowance, and are not entitled to full faith and credit. No person can know

what the communications were but the parties themselves between whom they are made, and a judicial investigation into those communications, which are of themselves a violation of law, would inspire a desire not only to avoid their penal consequences, but to maintain the character of good citizens, by making it appear that they had no improper influence upon the mind of the juror in the trial of the case. Testimony derived from such contaminated sources would be entitled to but little credence, and certainly could not form a reliable basis for the intelligent action of a court in a case involving the momentous issues of life and death. The great difficulty in determining what communications were made and what effect they may have had upon the minds of the jurors, is sufficient, in our opinion, to condemn the practice.

And we think that the purity and integrity of mode of trial can be preserved only by a close adherence to the common law rule, which requires that the jury shall be kept together and not allowed to separate from their fellows without being attended by the bailiff or officer having them in charge, until the case is tried or otherwise disposed of, and they are regularly discharged by the court. By permitting the jury to go at large, as in the case now under consideration, they were liable to be tampered with and to imbibe prejudices against the accused. It is immaterial whether improper influences have been exerted or not; the only safety is in keeping the jury free from the liability to such influences. *McQuillen vs. State*, 8 S. & M. 596. The door to tampering must be closed, and the only effectual way to do it, is to set aside verdicts when found under the circumstances above indicated.

But, in all other cases of irregularity, in which it may be made to appear that the jury, during the trial, have been exposed to improper influence which might have affected the purity of their verdict, such exposure shall vitiate the verdict, unless it affirmatively appear that such influence failed to have any effect in procuring it.

In this case it is suggested by the counsel for the State that if there was any error in permitting the jury to separate, it was cured by the consent of the prisoner. We do not agree with counsel in this view of the law. We are of opinion that the court has no power to authorize the separation of the jury during the trial of a capital case, either with or without the consent of the prisoner, except in cases of great necessity; and if it be done, and the prisoner be found guilty, a new trial will be granted. The prisoner ought not to be asked to consent. Who dare refuse to consent, when the accommodation of those, in whose hands are the issues of his life or death, is involved in the question? He would have to calculate the chances of irritation from being annoyed by a re-

fusal on the one hand, and of tampering on the other. No consent of the prisoner, in the extremity of his need, ought to bind him. He may really be unwilling to permit the jury to separate, but may consent for fear that his refusal may prejudice the jury against him. *Peiffer vs. the Commonwalth,* 15 Penn. State Rep. 468, (53 Am. Dec. 605); the *State vs. Hornsby,* 8 Rob. (La.) 554 (41 Am. Dec. 305); the *State vs Populus,* 12 La. Ann. Rep. 710; the *Commonwealth vs. McCaul,* 1 Virginia Cases 271; *Westley vs. the State,* 11 Humphreys (Tenn.) 502; *Wiley vs. the State,* 1 Swan (Tenn.) 256; and the *People vs. Backus,* 5 California, 275.

For these reasons the judgment must be reversed, and the case remanded for a new trial."

For the foregoing reasons, and upon the principles laid down in the preceding case, we submit that this case should be reversed and a new trial directed.

Whether this court inclines to the view that the accused must show prejudice resulting from a separation, or, that it will be presumed from the fact of separation, we believe the result will be the same and a new trial granted, for the reason that the only showing in the record is of facts tending to show prejudice, such as reading the newspapers containing vicious articles relating to the accused. This will be considered separately, in the succeeding point.

"Hence, the separation of the jury in such a way as to expose them to tampering, may be reason for a new trial, variously held as absolute, or *prima facie,* and subject to rebuttal by the prosecution; or contingent on proof indicating that a tampering really took place. *Wharton Criminal Pl. & Pr.* §821, 823, 824, and cases cited.

Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."

*Mattox vs. U. S.,* 146 U. S. 140, 153, 36 L. Ed. 917, 921.

## THE NEWSPAPER ARTICLES READ BY THE JURORS DEPRIVED THE DEFENDANT OF A FAIR TRIAL.

The 44th Assignment of Error is (R. 80):

44. The court erred in permitting the jury to read the daily newspaper accounts of the trial and comments thereon during the progress of the trial.

The jury was sworn on the morning of December 11, 1908, (R. 23, 27) and at noon of that day the record shows as follows:

THE COURT: This court will be at recess until 2 p. m. (The jury being duly admonished.) (R. 35.)

Of what that due admonishment consisted appears in the opinion of the court:

"And on each occasion of adjournment the court admonished the jurors to refrain from talking about the case or any subject connected with it, either with each other or with any person, and not to listen to anything which might be said about the case out of court, and not to have any communication on any subject whatever with the parties, witnesses, or attorneys in the case, and to avoid, *as far as possible*, receiving any impression as to the merits of the case other than what should be made upon their minds by the proceedings of the trial." (R. 10-11.)

The attitude of the court on this subject appears from his statements to the jury during the course of the trial (R. 45-46):

"* * * You should understand that all through this trial, as the court will instruct you finally, after the evidence is in, that you are to decide this case on the testimony as it comes from the witnesses on the witness stand; not by what counsel say, not by what I say, not by what the newspapers publish, or anything of that kind. I am not excluding you, because I assume that you are men of experience and common sense; that you can sift this matter and decide this case upon the testimony that the court rules and decides to be competent and admissible testimony."

We also quote from the trial court's opinion (R. 16):

"* * * There was no departure from the practice of this court, which has been uniform during the period of nineteen years since it was organized, and although different from the practice in some other courts, nevertheless I am fully convinced that no legal or prejudicial error was committed. * * * I deny that in order to be fair towards an accused person, whether he be in fact guilty or innocent, it is necessary or proper to imprison jurors as if they were culprits, * * *"

(R. 10.) "It is the opinion of the court that the defendant has had a fair trial by a jury composed of fair-minded, intelligent, honest men, and it will not be presumed that they were influenced in making their decision by the newspapers." (R. 10.)

The jury separated on Friday, December 18, 1908, after both sides had finally rested. It had been stipulated that counsel should deliver their arguments on Monday morning, December 21st. (R. 66). On Sunday morning, December 20,

1908, the newspapers published an article which bears intrinsic evidence of its authorship and of the deliberation with which it was prepared. (R. 70-72.)

This court will notice that this article stated that the defendant would take the stand in his own behalf on Monday morning, that the Government would put on another important witness on his way from Chicago. Reference was made to an alleged confession which "was held by Judge C. H. Hanford to be non-admissible and the jury was cautioned to take no cognizance of it." Then followed the headlines, "Story of the Crime," and in the account which followed it was stated: "The Government will attempt to prove," "it will charge," "the body was dragged into the corner, according to the allegations of the Government," "according to the charges against the accused man," "the Government is attempting to prove." This "Story of the Crime" contains many allegations in support of which there was absolutely no testimony introduced. With careful detail are arranged the acts of a crime, recital of which could not help but inflame the mind and arouse the passions, thus presenting statements to them that could not be included in any "summing up" by the prosecution.

We understand that the District Attorney, personally, had no part in this unfair attempt to prejudice the jury. But does it need argument to convince this court that the statement that "the Government will put on another important witness on his way from Chicago before the testimony for the prosecution is closed," "After the trial of Holt the Government will take up the case against Thos. H. Knight, the tailor, who was indicted with Holt in connection with the same case," challenges the defense to put the defendant on the stand as "efforts will be made by Elmer E. Todd, U. S. District Attorney, in cross examination, to bring out new evidence which he believes will tend to establish Holt's guilt?" Then, among all the horrible details of the supposed crime, which mention facts which were supported by no evidence, the cunning suggestion appears that an alleged confession was excluded and the jury might as well be told in so many words by this employe of the District Attorney's office that the defendant's attorneys dare not place their client on the stand for if they did so the prosecution would place in evidence the alleged confession, which the court had excluded. No deliberate plan to influence this jury could have been more cunningly contrived than the article in the Sunday morning paper, which appears in this record, (R. 70-72), and yet the trial court declared that "it will not be presumed that they were influenced in making their decision by the newspapers." (R. 10). That the jury did read these

accounts appears from a note in the record (R. 72): "The court refused to permit the filing of counter affidavits to show whether or not the jurors mentioned in said affidavit of Hugh M. Caldwell did read said papers, but ruled on said motion on the assumption that said jurors had read the newspaper articles therein set forth."

Were the jury improperly influenced by these newspaper articles? We quote from *Mattox vs. U. S.*, 146 U. S. 140, 149-151, 36 L. Ed. 917, 921:

"It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. * * *

"Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear. * * * The text books refer to many cases in which the action of the officer having a jury in charge, when prejudice might have resulted; or unauthorized communications having a tendency to adverse influence; or the reading of newspapers containing imperfect reports of the trial, or objectionable matter in the form of editorial comments or otherwise, have been held fatal to verdicts.

"The jury in the case before us retired to consider of their verdict on the 7th of October, and had not agreed on the morning of the 8th, when the newspaper article was read to them. It is not open to reasonable doubt that the tendency of that article was injurious to the defendant. Statements that the defendant had been tried for his life once before; that the evidence against him was claimed to be very strong by those who had heard all the testimony; that the argument for the prosecution was such that the defendant's friends gave up all hope of any result but conviction; and that it was expected that the deliberations of the jury would not last an hour before they would return a verdict, could have no other tendency. Nor can it be legitimately contended that the misconduct of the bailiff could have been otherwise than prejudicial. Information that this was the third person Clyde Mattox had killed, coming from the officer in charge, precludes any other conclusion. We should, therefore, be compelled to reverse the judgment because affilavits were not received and considered by the court, but another ground exists upon which we must not only do this, but direct a new trial to be granted."

District Judge Dyer in *U. S. vs. Salentine*, 8 Biss. 404, Fed. Cas. 16213, quotes with approval the following language of Judge Clifford from *Johnson vs. Root*, Fed. Cas. 7409:

"Irregularity on the part of the party charged or of the jury, must be satisfactorily proved in order to lay a foundation for the interposition of the court, but when the irregular conduct is established, it is not necessary that it should certainly appear that it influenced the jury. In that state of the case it is sufficient that the irregularity appears to be of a character that it might have affected the impartiality of the proceedings."

Judge Dyer continues: "Such was the rule laid down in *Com. vs. Roby*, 12 Pick. 520, and it appears to be correct. * * *"

The court then cites *Knight vs. Inhabitants of Freeport*, 13 Mass. 218, to the effect that "it is not necessary to show that the mind of the juror thus tampered with was influenced by the attempt. Perhaps it is not in his power to say whether he was influenced or not."

An eminent authority, Judge Emlin McClain of Iowa says:

"The accounts were written in a somewhat sensational manner, though not perhaps objectionable as news intended for the general public. They were not confined to verbatim reports of the testimony of the witnesses, but in a large extent consisted of condensed accounts of what was testified to by the witnesses, and statements of the facts involved, some of them not shown by any evidence in the case. However fair these accounts may have been, and for the most part they were unobjectionable as a current report of the proceedings, they were communications with reference to the case which the jurors should not have received. The only discussion of the evidence which the jurors should have had an opportunity to consider, before they are secluded for the consideration of their verdict, are discussions in open court by the attorneys of each party in the presence of those for the other, in which errors of statement may be corrected and improper inferences may be controverted. The jurors should not subject themselves to the danger of misconception and error which must exist if outside persons, without the checks incident to an orderly trial and discussion in court, are allowed to sum up the evidence, emphasize its particular features and suggest the conclusions to be drawn therefrom. It is scarcely necessary to cite authorities in support of so plain a proposition.

New trials have frequently been granted for such misconduct. A few cases are sufficient to show the views of courts in general on the question. *State vs. Walton*, 92 Iowa 455, 61 N. W. 179; *Cartwright vs. State*, 71 Miss., 14 So. 526; *People vs. Leary*, 105 Cal. 486, 39 Pac. 24; *People vs. Stokes*, 103 Cal. 193, 37 Pac. 207, 42 A. St. Rep. 102; *People vs. McCoy*, 71 Cal. 395, 12 Pac. 272; *Walker vs. State*, 37 Tex. 366; *Carter vs. State*, 9 Lea (Tenn.) 440; *State vs. Robinson*, 20 W. Va. 712, 43 A. Rep. 799; *Farrer vs. State*, 2 Ohio State 54; *Mattox vs. U. S.*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; *Meyer vs. Cadwalader*, (CC) 49 Fed. 32. Affidavits of the jurors were introduced on the part of the state to show that they were not influenced in their action by the accounts they read; but it was not sufficient to show by them that they were not consciously influenced. The unconscious influence of such accounts would be far more likely to affect the result than an influence of which they were conscious, and which they might the more readily retain."

*State vs. Caine*, (1907) 134 Iowa 147, 111 N. W. 443.

Judge Acheson in a civil case which arose in the Circuit Court for the Eastern District of Pennsylvania, where the newspaper account was also complicated by the fact that it purported to have emanated from an officer of the Government concerned in the prosecution of the case says:

"But the most objectionable of all these publications was what purported to be an interview between the newspaper reporter and the special agent of the treasury department, who sems to have had charge of the preparation of the Government case, and who was present at the trial. This interview, in substantially the same form, appear on the same day in the issue of two different newspapers, and the statements therein contained, as coming from this Government official, bear marks of very deliberate preparation. This official as reported, undertook, in a newspaper interview intended for publication, to discuss the merits of the case on trial with respect to each particular kind of goods involved in the controversy and to pronounce that their chief use was for other specific purposes than the trimming of hats, stating facts to support his assertions; and he further stated that one of the plaintiff's counsel, whose name was given, and who was described as 'the chief lawyer for the Hat Trimming Syndicate' had declared to a certain named Government appraiser that the importers did not claim nor expect to have certain satins in controversy in this case classed as hat materials, but, he added, 'he now comes here, and will vigorously contest that

they are.' In one of the newspapers containing this interview this treasury agent is represented as declaring: 'I am only too glad to give my views, as I think that the people should know all the facts in this attempt to loot the United States treasury.' There has been no sort of denial of either the genuineness or the accuracy of these published interviews.

It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of the session of the court, and it is incredible that, going out in the community, they did not see and read these newspaper publications. That these public statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it. Good ground, therefore, here appears for setting aside the verdict."

In view of the statement of the court during the trial (R. 45, 46) that the jury should not be influenced by newspaper accounts of the trial and his oft-repeated declaration that he would not exclude them during arguments which abounded in declarations that the defendant had confessed, the court can see how vain would have been the attempt to induce the trial court to take any other position. We quote from the court's opinion:

"Previous to the arguments made to the jury the court cited one of the reporters and in the presence of the jury interrogated him concerning a published article referring to the case which the jurors necessarily knew was inaccurate, and elicited from him that he was the author of it and that he had been misinformed in regard to some of the facts * * *"

The vice of the article was not alone its inaccuracy but in the fact that it was apparently deliberately planned and cunningly contrived to suggest to the jury that the reason the defense had not dared to place on the stand the defendant to testify in his own behalf was because, had they done so, the prosecutor would have condemned the defendant from his own lips. What other reason than that could there be for incorporating into this article a statement that the prosecution had offered an alleged confession, which had been rejected? What was the "Story of the Crime" but an attempt to conjure up before the jury the facts which the prosecution alleged would be shown in the event that the defendant took the stand?

The article published just after the evidence was all in and just before the argument, was replete with statements upon which the record was silent.

"It will charge that the victim * * * fell groaning and bleeding to floor, Holt picked up the weapon and struck the victim two blows on the head. * * *

Knight went into Johnson's room in the basement, according to the allegations of the Government, and stood in the corner back of a work bench. Holt went out where Johnson was talking to some persons and asked him, it is alleged, to come to his room, as he had some money he wanted to pay him, but asked that he write out a receipt. As Johnson sat down to write he was struck three times on the back of the head with the fish plate. The victim fell face downward on the table, groaning with pain and practically insensible, when he was struck two more blows on the head."

These are among the statements on which there was absolutely no evidence. An employee of his office, through the newspapers, was able to place before the jury the alleged revolting details of a crime which the District Attorney had never suggested to them. He was enabled to argue a fantastic theory of the case that had never been suggested to them, and which the Court would never have permitted his chief to make.

Whatever may be said about the other articles, this was a deliberate attempt by unfair and false statements to convict a man through the newspapers with the wildest conjectures; it was an attempt to reach the jury in a manner which defendant could not employ and against the venom of which he was powerless. We have not found a case approaching the prejudicial character of this attempt which has not been reversed.

The court will recall that when the jury returned on the morning of December 22nd, one of their requests was that they be permitted to "to have or see portions of the evidence." (R. 61.) It is evident, therefore, that there was a question of fact btween some of the jurors. They had forgotten what they considered material portions of the evidence. Is it reasonable to suppose the dramatic and exciting incidents of the attempt to introduce an alleged confession had been effaced from their minds? Is it likely that the evidence they had heard in the earlier days of the trial was then as fresh in their minds as was the fascinating story, seductive in its gruesomeness, which they had read in the papers of the day before? We submit that it is impossible to believe that the jury was not prejudiced.

The record herein does not show the presence of the accused on December 21, 1908, the day on which argument by counsel was made, on which the jury was charged and on which they retired to deliberate on their verdict. (R. 66.) We would not mention this error except for the fact that it is not a techin-

cal defect in the record as before this court, but is a defect which appears on the face of the record below and which cannot, therefore, be corrected by a supplemental transcript. *Lewis vs. United States,* 146 U. S. 370, 36 L. Ed. 1011.

We have endeavored to place before this court the errors of law occuring on the trial below. We are convinced that the defendant did not have that fair trial, which is his absolute right. We realize that on many points our views conflict with those of the learned Trial Court, but we contend that the sentence herein should be reversed and a venire facias de novo awarded.

Respectfully submitted,
HUGH M. CALDWELL.
C. F. RIDDELL.
JOHN LEWIS SMITH.
Attorneys for Plaintiff in Error.

# In the Supreme Court of the United States.

OCTOBER TERM, 1910.

JAMES H. HOLT, PLAINTIFF IN ERROR,
*v.*
THE UNITED STATES.
No. 231.

*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.*

## BRIEF ON BEHALF OF THE UNITED STATES.

### STATEMENT OF THE CASE.

Holt was indicted May 22, 1908, for the murder of one Henry E. Johnson, in the Fort Worden Military Reservation on the 8th of May, 1908. (Rec., p. 1, 2.) A general demurrer was filed to the indictment, which was overruled. (R., p. 2, 3.) Thereupon, on June 15, 1908, plaintiff in error entered a plea of not guilty. (R., p. 4.) On the trial, the jury returned a verdict of "guilty as charged in the indictment, without capital punishment." (R., p. 4.) A motion in arrest of judgment was entered, also a motion for a new trial, the several grounds of which will be

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hereinafter considered. These motions were overruled, and to the action of the court in overruling the demurrer and overruling certain motions during the progress of the trial, in his rulings on the evidence, and in giving certain propositions in charge to the jury and refusing certain requests offered by plaintiff in error, forty-six errors were assigned, and the case removed by writ of error to this court.

Many of the errors assigned relate to similar questions, and they will, therefore, be considered in groups.

## BRIEF AND ARGUMENT.

### I.

**The court did not err in sustaining the validity of the indictment.** (Assignments of error 1–8.)

The several grounds of attack upon the indictment, and the Government's reply thereto, are as follows:

1. *That the indictment does not allege that the crime was committed at a place within the exclusive jurisdiction of the United States.*

The allegation of the indictment is that plaintiff in error assaulted and mortally wounded the deceased, Henry E. Johnson, "on the 8th day of May, A. D. 1908, within the Fort Worden Military Reservation, a place under the exclusive jurisdiction of the United States of America." (Rec., 1, 2.) This language can mean nothing else than that Fort Worden was a place under the exclusive jurisdiction of the United States on the 8th day of May, 1908, when the offense was committed.

2. *That it is not alleged that the assault was made feloniously and with malice aforethought.*

The indictment alleges that plaintiff in error "did, with force and arms, an assault make upon one Henry E. Johnson * * * and did then and there *feloniously*, willfully, knowingly, and *with malice aforethought* strike, beat, and mortally wound him * * * with intent to kill and murder him." (Rec., 2.)

It is certainly as efficacious to allege that the acts constituting the assault were done feloniously and with malice aforethought, as to allege that the assault itself was done in such manner.

3. *That the court overruled plaintiff in error's motion that he be allowed to withdraw his plea of guilty and to interpose a plea in abatement and motion to quash the indictment, based on the ground that the indictment was found by the grand jury on incompetent testimony.*

There are two reasons why this action of the court was not error:

(*a*) It was within the discretion of the court to allow or to refuse the withdrawal of the plea and the filing of the demurrer and the entry of the motion to quash. The plea of not guilty was entered on June 15, 1908 (Rec., p. 4); the motion to withdraw the plea was not made until December 11, 1908. (Rec., pp. 23, 24.) There was nothing in the affidavit filed or in the record to indicate that it was not proper for the grand jury to return the indictment, and it was certainly no abuse of discretion for the court, after that delay, to refuse permission to withdraw

the plea of not guilty and to file a demurrer and enter a motion to quash the indictment upon purely technical grounds.

In *McGregor* v. *United States* (134 Fed., 187) the Circuit Court of Appeals, Fourth Circuit, held that it is not the duty of a trial court, on a motion to quash an indictment, to investigate the character of the evidence taken by the grand jury, in order to ascertain if a portion of it was incompetent or illegal, or if it was insufficient to justify the finding of the indictment, and such matters should not be gone into unless in exceptional cases, where the ends of justice imperatively require it; and, further, that a motion to quash an indictment is addressed to the discretion of the court, and in the Federal courts the refusal to quash will not be reviewed in an appellate court. In accord with this last proposition, in *Radford* v. *United States* (129 Fed., 49, 51), the Circuit Court of Appeals, Second Circuit, held that the denial of a motion to quash an indictment, on the ground that it was based on incompetent evidence of essential facts before the grand jury is a matter of discretion, and is not a proper subject of exception.

(*b*) To justify the quashing of an indictment on motion or plea in abatement, on the ground that the grand jury received incompetent evidence, it must appear that the *entire* evidence presented to the grand jury was inadmissible, and the mere fact that some of the evidence introduced was incompetent does not invalidate the indictment.

The motion was rested upon the facts disclosed in an affidavit of Caldwell and Riddell, plaintiff in

error's attorneys, in which it was stated that they had been informed by Harry W. Newton that he, in testifying before the grand jury, had detailed certain confessions that had been made by the accused, which confessions, it is insisted, were inadmissible. This same evidence was subsequently offered on the trial of the case, but was rejected by the court on the ground that the confessions were probably made as a result of some inducement that had been held out, or threats made by those having the prisoner in charge. The affidavit does not state that there was no other evidence before the grand jury, or that the indictment was returned solely upon the testimony in question; but the contrary is shown by the following indorsement upon the indictment:

> Witnesses examined before grand jury: R. P. Reeder, Robert V. Church, Edward Shafer, Benjamin F. Guinan, Charles J. Coleman, George E. Handley, H. W. Newton, Dr. E. H. Porter. (Rec., p. 2.)

The following authorities support the Government's contention:

In *Mencheca* v. *State* (28 S. W. Rep., 203) it was held by the Court of Criminal Appeals of Texas that the fact that—

> the accused was carried before the grand jury and there testified to facts criminative of himself * * * can not be made the ground of a motion to quash the indictment.

In *People* v. *Lauder* (82 Mich., 109) the court held that the fact that the respondent had been subpœnaed to attend before the grand jury, was sworn, and

gave testimony relative to a charge of bribery then being investigated, and that upon his and other testimony a true bill was found against him, did not vitiate the indictment. The opinion contains a full discussion and review of the authorities bearing upon the question.

In *Hope* v. *People* (83 N. Y., 418, 422) the court said:

> We find no authority for the position that the sufficiency of the evidence upon which an indictment is found by the grand jury is a question which can be raised by plea to the indictment, or that the reception of incompetent or irrelevant evidence by the grand jury can be pleaded. *People* v. *Hulbut* (4 Denio, 136) is to the contrary, and no case has been cited in support of the plea.

In *State* v. *Dayton* (23 N. J. Law, 49) the court held that an indictment found by the grand jury upon illegal evidence, or without legal evidence, can not be taken advantage of by the defendant on a motion to quash, by plea in abatement, or in any other way; but that the court might, where the administration of justice requires it, in its discretion quash an indictment for misconduct in the grand jury.

In *State* v. *Logan* (1 Nev., 509, 516) the court said:

> That a grand jury should receive none but legal proof is an old and well-established rule, but that the admission of evidence not strictly legal will authorize a setting aside of

> an indictment is a proposition which seems to have no authority to sanction it, and if adopted would only be an impediment to the execution of criminal justice, for it is evident that under the present practice not one indictment out of five could be found where it could not be shown that some illegal proof was received.

In some jurisdictions it has been held that an indictment should be quashed where it appears that the accused was compelled to testify against himself as to material facts on the investigation by the grand jury, but we are aware of no authority holding that the grand jury must determine with accuracy when a confession made by an accused is competent and when incompetent, and if it should be mistaken as to its competency, its reception would vitiate the indictment. Such a rule would subject an indictment to the same tests with reference to the admission of evidence, as is applied by an appellate court to the rulings of the trial court; and would invalidate a very large proportion of all indictments returned.

II.

**The case should not be reversed on the ground that the trial court refused to sustain defendant's challenge for cause of venireman Gilchrist because he had formed an opinion as to the guilt or innocence of the defendant.** (Assignment of error 11.)

(1) *Gilchrist had not formed such an opinion as disqualified him for service as a juror.*

On his examination Gilchrist testified in substance that he supposed he had passed remarks about the

case when he read about it, but he did not talk with anybody who purported to be a witness or professed to know anything about the facts of his own knowledge, but only with people who read the newspapers; that he took the newspaper statements as though they were facts; that he had no opinion more than just what the papers stated. He was then asked:

> Q. Mr. Gilchrist, can you lay aside whatever opinion or impression you got from reading the newspaper and try this case solely upon the evidence given in this court room?
>
> A. The evidence would change it very easily.
>
> Q. *I mean, can you lay aside whatever opinion or impression you may have and decide the case solely upon the evidence given in the court room?*
>
> A. *Yes, sir.*
>
> * * * * *
>
> Q. *You think, if taken as a trial juror, you can try the case solely upon the evidence, fairly and impartially under the instructions of the court as to the law?*
>
> A. *Yes, sir; I think I can.*
>
> Q. *And in that case render a fair and impartial verdict?*
>
> A. *I think so.*
>
> (R., p. 20.)

On cross-examination by counsel for the accused the following questions and answers appear:

> Q. Mr. Gilchrist, you said that the opinion which you formed from the newspaper was such an one as could be removed by evidence?
>
> A. Yes, sir.
>
> Q. Would it take some evidence to remove the opinion which you have formed?

A. Well, yes; I would not remove it now without any evidence.

Q. It would require some evidence to change the opinion which you have formed?

A. Yes, sir.

Counsel thereupon offered to challenge the juror for cause, when the court asked the following question:

Q. Mr. Gilchrist, on this trial if the evidence failed to prove the same state of facts which you read, would you decide the case according to what the newspaper published or decide it according to the evidence, or lack of evidence, on the trial?

A. The evidence on the trial.

The court thereupon refused the challenge, to which an exception was taken (R., p. 21).

On further examination, Mr. Gilchrist was asked:

Q. Do you still believe that the statements which you saw in the paper were true?

A. Well, I don't know whether they are or not.

Q. You would require some evidence to change your belief in the matter?

A. It would require evidence; yes, sir. If there was no evidence submitted to me I would have to take what I saw in the paper. (R., p. 22.)

Counsel thereupon again offered to challenge the proposed juror for cause, which was denied, and an exception taken (R., p. 22).

In considering the character of opinion that renders a juror incompetent, Chief Justice Marshall,

on the trial of Aaron Burr (Fed. Case No. 14, 692g; 25 Fed. Cases, 49, 51), said:

> The opinion which has been avowed by the court is that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him.

In *Reynolds* v. *United States* (98 U. S., 145) the questions propounded to the venireman and responses thereto were as follows:

> Q. Have you formed or expressed any opinion as to the guilt or innocence of this charge?
>
> A. I believe I have formed an opinion.
>
> By the COURT. Have you formed and expressed an opinion?
>
> A. No, sir; I believe not.
>
> Q. You say you have formed an opinion?
>
> A. I have.
>
> Q. Is that based upon evidence?
>
> A. Nothing produced in court.
>
> Q. Would that opinion influence your verdict?
>
> A. I don't think it would.
>
> By DEFENDANT. I understood you to say that you had formed an opinion, but not expressed it?

A. I don't know that I have expressed an opinion; I have formed one.

Q. Do you now entertain that opinion?

A. I do.

After quoting the foregoing language of Chief Justice Marshall in the *Burr* case, this court, speaking through Chief Justice Waite, continued:

> In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely anyone can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial, because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not

> in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.

And, applying the principle to the case in hand, the court said:

> The challenge in this case most relied upon in the argument here is that of Charles Read. He was sworn on his *voir dire;* and his evidence, taken as a whole, shows that he "believed" he had formed an opinion which he had never expressed, but which he did not think would influence his verdict on hearing the testimony. We can not think this is such a manifestation of partiality as to leave nothing to the "conscience or discretion" of the triers. The reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls far short of raising a manifest presumption of partiality. (Page 156.)

A part of the foregoing language of Chief Justice Waite was quoted with approval in *Spies* v. *Illinois* (123 U. S., 131, 179).

In *Hopt* v. *Utah* (120 U. S., 430, 434) a refusal to allow a challenge for cause was sustained upon the following facts:

> The juror Gabott, challenged for both actual and implied bias, testified on his direct examination, in substance, as follows: That he had heard of the case through the newspapers, and read what was represented to be the evidence; that he had talked about it since that

time; that he did not think he had ever expressed an opinion on the case, but that he had formed a qualified opinion; that is, if the evidence were true, or the reports were true; that he had an opinion touching the guilt or innocence of the accused which it would take evidence to remove; but that he thought he could go into the jury box and sit as if he had never heard of the case, and that what he had heard would not make the least difference. On his cross-examination, he testified that he knew nothing about the case, except what he had read from time to time in the public press; that if what he had heard turned out to be the facts in the case, he had an opinion, otherwise not; that is, his opinion was a qualified one, and that, according to his present state of mind, he could sit on the jury and determine the case without reference to anything he had heard; that he was not conscious of any bias or prejudice that might prevent him from dealing with the defendant impartially; and that he thought he could try the case according to the law and the evidence given in court. On his reexamination he further stated that he would be guided by the evidence altogether, without being influenced by any opinion he might then have, or may have previously formed.

It is true that there was a statute in Utah which provided that one was not disqualified as a juror for an opinion formed or expressed upon statements in public journals, if it appeared to the court, upon his declaration under oath or otherwise, that he could and would, notwithstanding such opinion, act impartially and fairly upon the matters submitted

to him. But the constitutional provision guaranteeing the right of trial by an impartial jury can no more be violated by a legislative body than by a court, and the courts, therefore, have the same power to deny a challenge for cause as has Congress, or a territorial legislature.

In *Press Pub. Co.* v. *McDonald* (73 Fed., 440, 441, 442) the proposed juror stated on his *voir dire* that he had no prejudices against the defendant or newspapers in New York in general; that he thought the papers published articles which they ought not to publish, and said he had no doubt at all in regard to his ability to render an impartial verdict in the case against the newspaper. He was then asked by defendant's counsel:

> If the case involved the precise point suggested by his honor, as to whether or not the defendant has exercised fair care in the publication of an article affecting a private individual, would or would not the feeling that you hold affect your deliberation as a juror?

To which he replied "I think it would." The court then asked:

> Do you mean to say that you would assume that the newspaper had not exercised due care, irrespective of the character of the article, or the circumstances of the case?

And his reply was "No; I do not." A challenge for cause was refused, and in discussing the question the Circuit Court of Appeals, Second Circuit, said:

> It must be remembered that the question before the trial judge, although one of mixed

> law and fact, is, in the main, a question of fact, and that while he may be sometimes wrongly influenced by a desire to expedite the trial, or by impatience of delays, yet if his mind is undisturbed, the impression which the juror makes of his intelligence, fairness, and evenness of mind, from a personal inspection of him, and the belief in regard to his probable character which is created by his appearance under examination, his bearing and willingness to disclose the nature and extent of his preconceived opinions, are valuable, and have deserved weight before an appellate court, and therefore the finding of fact by the trial court will not be set aside except for manifest error.

In *Gallot* v. *United States* (87 Fed., 446, 449, 450) on the trial defendant offered to challenge certain jurors for cause, on the ground that they had formed an opinion from newspapers, rumors, and other sources as to the guilt or innocence of the defendant. They stated that these impressions and opinions would yield to evidence, and that they could and would give the defendant a fair and impartial trial according to the evidence that might be produced before them as jurors. Some of them indicated that it would require evidence to remove their impressions. The Circuit Court of Appeals, Fifth Circuit, held that the trial court properly disallowed the challenges, and in support of this view cited and quoted the foregoing from *Spies* v. *Illinois* and *Reynolds* v. *United States*, *supra*, and also quoted

from *State* v. *Dugay* (35 La. Ann., 327), in which appears the following:

> Our last researches on this point were suggested in the case of *State* v. *De Rance* (34 La. Ann., 186), in which we took occasion to make a thorough review of previous opinions on this subject, and in which we reaffirmed the rule, sanctioned in numerous cases, under which jurors who had formed and expressed opinions as to the guilt or innocence of the accused, but who asserted that they felt able to do impartial justice according to the law and the evidence in the case, were ruled to be competent jurors. We distinctly and emphatically reiterate that this is the correct rule, with the reasonable hope that it will be understood by the profession.

The court also quoted the following remarks of Chief Justice Agnew of Pennsylvania in *O'Mara* v. *Commonwealth* (75 Pa. St., 424, 428):

> We must either recede, and go back to the practice of an age when ignorance of passing events constituted a characteristic of the times, and exclude every juror who has formed any opinion, even the slightest; or we must stand abreast with the present age, when every remarkable event of to-day is known all over the country to-morrow, and exclude those only whose opinions are so fixed as to be prejudgments, or have been formed on the known evidence in the cause. It is needless to say the world moves and carries us with it, and if we lag behind we must commit the trial of the

> most important causes in life to those, so ignorant, their dark minds have never been smitten by the rays of intelligence.

(2) *Under the rule adopted by the Supreme Court of the State of Washington, it was not error for the challenge of juror Gilchrist to be denied.*

When a juror is not disqualified by an opinion within that jurisdiction, and when disqualified, is well illustrated in *Rose* v. *State* (2 Wash., 310, 311), the leading case upon this subject. Two persons were presented and examined, as to both of whom defendant's proposed challenge for cause was denied by the trial court. As to one, the Supreme Court held there was no error in the court's ruling, but that there was error in his ruling as to the other, the court saying:

> Marion Bullard was called as a juror, and upon examination stated that he had read such accounts of the Fredickson affair as were published in the current newspapers; that he had talked with other persons in regard to it, and heard them express opinions; that he had formed, but had not expressed, an impression or opinion of his own; but he further stated that his former impression would have no influence upon him as a juror, and would not cause him to construe the evidence upon the side to which his impression had previously leaned. A challenge for cause was denied, but we think the ruling was correct. Joseph Kaiser was another juror. He was a laborer on the farm of James Albright, one of the jurors on the trial of Edwards; talked with

> Albright and thirty or forty others about the case; read the newspapers, including accounts of the testimony before the coroner's jury, and at the preliminary examination; had to a certain extent formed an opinion as to the guilt or innocence of John B. Rose, which had not been changed; it was a confirmed opinion, which it would require evidence to remove; if sworn as a juror it would require strong evidence to remove his opinion as to the guilt or innocence of the defendant; he would be governed by the evidence as given at the trial, and the law as charged by the court; could lay aside all his previous impressions, but still had an opinion, though not a decided opinion. Defendant's challenge for cause was denied. This was error.

In *State* v. *Lattin* (19 Washington, 57, 61), after stating the substance of the proposed juror's evidence on the question of his competency, the court said:

> The witness did not testify that he could disregard the opinion he had formed, and could enter upon the trial free from its influence, as if he had not formed any, or, in fact, make it appear by his other testimony that he really had no such fixed opinion, but had directly testified that he had one and that it would require evidence to remove it.

In the present case, juror Gilchrist was asked, "Can you lay aside whatever opinion or impression you got from reading the newspaper and try this case solely upon the evidence given in this court room?" He answered, "The evidence would change it very easily."

Question. I mean, can you lay aside whatever opinion or impression you may have and decide the case solely upon the evidence given in the court room?

Answer. Yes, sir. (R., p. 20.)

Clearly, under the rule above laid down by the Supreme Court of the State of Washington, Gilchrist was a competent juror. (R., p. 20.)

The several cases cited in plaintiff in error's brief (p. 29) should be examined along with *State* v. *Royse* (24 Wash., 440, 445); *State* v. *Boyce* (24 Wash., 514, 521); *State* v. *Farris* (26 Wash., 205, 210); and *State* v. *Croney* (31 Wash., 122, 125).

From a consideration of these cases it appears that that court has drawn a distinction between an impression which can be laid aside by the juror, and which will not prevent him from giving the accused a fair and impartial trial, and a fixed opinion which it requires evidence to remove. And this distinction is substantially the same as that drawn by Chief Justice Marshall on the trial of Aaron Burr.

(3) *The record fails to disclose that competent and fair jurors were not obtained, or that the jury was not composed entirely of individuals acceptable to the accused.*

In *Northern Pac. R. R. Co.* v. *Herbert* (116 U. S., 642, 646) the court allowed the defendant in error to challenge a proposed juror on the ground that he was a lumber dealer, and that the defendant company had given him a place on its right of way for a lumber yard, without rent; and also that he had heard the accident spoken of and explained. This

action of the court was assigned as error, but this court said:

> If we regard the challenge as for cause, its allowance did not prejudice the company. A competent and unbiased juror was selected and sworn, and the company had, therefore, a trial by an impartial jury, which was all it could demand. (Citing a number of authorities.)

It is true that the bill of exceptions in this case recites that the defendant exercised each and every one of his twenty peremptory challenges before the jury which tried the case was finally selected and sworn (R., p. 19); but it does not recite that he offered to challenge, either peremptorily or for cause, either of the twelve selected, and he must therefore have been satisfied with each of them.

Manifestly, a defendant can not take advantage of being improperly required to exercise a peremptory challenge unless some injury results therefrom, and no injury can result unless he is compelled thereby to accept a juror which he did not desire. What is necessary to preserve the question for the appellate court is shown by the course taken by counsel on the trial in *State* v. *Stentz* (30 Wash., 134, 137), where, after the evidence of the proposed juror was given and the ruling of the court had, the subsequent proceedings were as thus detailed:

> The impaneling of the jury in the case then proceeded, the appellant having exercised his fifth peremptory challenge by excusing O. W. Piper, one of the jurymen. Thereupon one

> J. E. Gibbs was drawn as a juryman, and, upon being questioned as to his competency and qualifications by the counsel for state, testified in substance: That he had formed an opinion from reading newspaper articles; that he had no fixed opinion; that he could disregard it; that he still had the opinion so formed; that it would require some evidence to remove it; that what he had read would have no weight or affect him in any way upon the trial. This juror was challenged by the appellant and the challenge denied. The appellant thereupon excused the juror Sperry, thereby exercising his sixth and last peremptory challenge.

Therefore, counsel for the defendant in that case not only exhausted his last challenge, but also offered to challenge one of the jurors whom he was compelled to accept.

(4) *The action of the court in refusing the challenge was not properly excepted to by plaintiff in error.*

The language used by counsel in making the exception was:

> We would like to interpose a challenge for cause (R., p. 22),

without stating the particular ground upon which the challenge was proposed. It is true that the examination indicated what was probably in counsel's mind, but this precise question arose in *Southern Pac. Co.* v. *Rauh* (49 Fed., 696, 700), and the Court of Appeals, Ninth Circuit, held that the ground of challenge was not stated with sufficient definiteness, and

cited to sustain their holding decisions of the appellate courts of Oregon, New Jersey, New York, California, Nevada, Mississippi, North Carolina, and Iowa.

III.

**The court did not err in refusing to exclude the jurors when the motion to set aside the plea of guilty was made and discussed, and during the preliminary examination of witnesses Porter and Newton as to alleged confessions made by the accused.** (Assignments of error 12–14 and 27.)

The following is what the record shows occurred in the presence of the jury on the occasions when the court was requested to exclude them:

1. After the jury had been selected, and before it was sworn, counsel for plaintiff in error asked that he be permitted to state to the court and the district attorney why he would like the jury excluded, saying it would be error for any matter to go before the jury which was improper for them to consider. The court stated that he would make no order excluding the jury. Counsel then asked if he might make a statement to the court and the district attorney out of the hearing of the jury; the court replied that he would have no mystification about the trial; that if there was anything secret and improper for the jurors to hear, it had no place in the trial, and that the things the jury would imagine would be ten times more prejudicial to the defendant than to be out with what it was.

Exception was taken to the court's refusal to send the jury out, and counsel then presented the motion

for leave to withdraw the plea of not guilty and to enter a motion in the nature of a plea in abatement to quash the indictment, stating that it was based upon an affidavit which he would like to read. The court then remarked, "Pass it up to me and I can see what is in it quicker," and the court then read the affidavit. The affidavit was made by Messrs. Caldwell and Riddell, attorneys for plaintiff in error, and was in substance that Harry W. Newton had informed them that he had testified before the grand jury that defendant had admitted complicity in the murder of the deceased. The court then remarked, "I understand the affidavit; now you may argue the matter just as if the affidavit had been read," and further stated, "While I am hearing this argument the jurors are at liberty to retain their seats if they want to, but you can be at ease; if you want to go outside, you may. You are not excluded from hearing it."

The bill of exceptions then recites, "Argument on motion by Mr. Caldwell," but there is not a word of the argument set out in the record. The court then overruled the motion, stating merely that the plea in abatement was based on the ground that improper and incompetent evidence had been made the basis of the indictment. Counsel then asked that the jury be discharged because of what had passed in their presence and a new jury be empaneled, which request was denied and an exception thereto taken. (Rec., pp. 23–27.)

It will be observed that the record fails to show that one word was said in the presence of the jury

which indicated that a confession had been made by plaintiff in error. While the affidavit would indicate that such confession had been made, yet it was read *privately* by the court, *and there is nothing to show that the jurors heard a word that was contained therein; nor is there anything to show what was said by counsel in argument.* Moreover, it was wholly unnecessary that the contents of the affidavit be mentioned, as it presented purely a question of law, and it was unnecessary to discuss the facts.

2. On the examination of the witness E. H. Porter he testified to Holt's putting on a blouse, and was asked: "Did he make any statements in regard to that blouse at that time, voluntarily?" Objection was interposed to the recital of any statements as to what defendant said, and the court remarked:

> Before the court admits him to repeat any statements that the defendant may have made, interrogate him fully as to the circumstances and conditions under which the statement was made (R., p. 38);

and, after a few questions and answers in which it was shown that certain persons were present, that no threats were made, that the prisoner was not in chains, and that the statements were made voluntarily, counsel for Holt requested that the jury be excused until the circumstances under which any conversations were had with defendant were determined by the court to be proper or improper for their admission, which request was denied and exception taken. It was then proved by the witness

that Holt was interrogated by Captain Newton, who was president of the board appointed to investigate the killing, and that so far as the witness knew no other officer had an interview with Holt.

The court then stated that at the present time he would sustain the objection of counsel, and would not permit evidence of statements of Holt offered to be introduced. (Rec., pp. 38, 39.)

Certainly nothing occurred during the examination of this witness that could have possibly prejudiced plaintiff in error.

3. On the examination of Capt. Harry W. Newton, he was asked by the United States attorney whether he had any conversation with the defendant after his arrest. Counsel for defendant objected to anything in relation to any conversation. After a few remarks between the court and the attorneys, the court said to the district attorney: "You said the other day that there were Supreme Court decisions which were to the effect that the Government had a right to prove such conversations," and asked if there was anything later than the *Bram* case. The district attorney replied: "No, sir; nothing later than the *Bram* case. There have been confessions admitted——." Here counsel objected to the use of the word "confession" by the prosecutor, stating that there was nothing in the case to show that defendant had made a confession, and objected to its use in the presence of the jury. The court replied:

> Nobody said that he did make a confession. We can't curtail the use of the English language by the prosecuting attorney. On the

> hearing he may express himself by words that the court understands and that he understands. (R., p. 44.)

Counsel for Holt thereupon asked that the jury retire, which request was denied and exception taken.

Then followed some discussion with reference to the decisions of the Supreme Court of the United States upon this question, and in this discussion the word "confession" appears, *but not in connection with Holt.* The district attorney finally remarked:

> In the case at bar, I am satisfied, if the court will allow me to show the circumstances under which any statements were made to Captain Newton, he will hold that the statements of Holt were wholly voluntary and entitled to admission. (Rec., p. 45.)

Counsel for Holt then said:

> We take an exception to counsel stating in the presence of the jury that any statements were made to Captain Newton after his arrest, and while held at Fort Worden, on the ground that they are calculated to prejudice and bias the jury against the defendant.

The court thereupon remarked to the jury:

> Gentlemen of the jury, these remarks of counsel should not be understood as implying that this jury has not got fortitude enough to resist any influence of prejudice that might be created by hearing remarks that are proper to be made to the court in discussing a legal question. You should understand that all through this trial, as the court will instruct

> you finally, after the evidence is in, that you are to decide this case on the testimony as it comes from the witnesses on the witness stand; not by what counsel say, not by what I say, not by what the newspapers publish, or anything of that kind. I am not excluding you, because I assume that you are men of experience and common sense; that you can sift this matter and decide this case upon the testimony that the court rules and decides to be competent and admissible testimony. (Rec., pp. 45, 46.)

In beginning the preliminary examination, the witness was warned by the United States attorney to "be sure and not state anything that was said." Counsel for defendant interposed the objection that the facts should be proven before it was intimated that anything at all was said, which objection was overruled. Quite a lengthy preliminary examination followed, in which the principal matters of complaint are as follows:

Witness stated that on Monday morning the prisoner was brought to the hospital with Doctor Porter and Captain Abbott to have his picture and the imprints of his fingers taken; that they both were asking Holt questions, and Doctor Porter turned to the witness and asked him if he had anything to ask the prisoner, and witness replied that he had nothing further at all and cared for no more information from him, and that they got up to start for the guardhouse when the prisoner made a request, and from the prisoner's demeanor he understood it to be voluntary.

At the request of counsel for the accused he was then permitted to examine the witness, and on this cross-examination the witness stated:

That at the first interview the prisoner was given to understand that he was suspected of the crime; that he was subsequently told that other parties who had been arrested were putting it onto him, and would get from under and leave it all on him if he didn't look out for himself; that Doctor Porter said to Holt, "You might as well tell it and clear yourself, Holt, because the others have put it onto you, or are putting it onto you;" that Doctor Porter also said, "Holt, the men are very much incensed towards you over what you have done," and asked him about his mother and sister and family, and then said, "Holt, if you have any regard for them, have any feeling toward them, don't you think you better tell us all about it now," and Holt answered, "What good would it do my mother or sisters if I did state it." (Rec., pp. 49–51.)

Counsel thereupon objected to the statement of witness as to what Holt remarked, and asked that it be stricken out and the jury instructed to disregard it. The court ordered it stricken out, and said:

> The jury will understand; all these questions are to fix in my mind the question as to the admissibility and the competency of the testimony that the Government wants to offer, and it has no bearing at all on the question you have to decide. (Rec., p. 51.)

The use of the word "you" shows that this remark was addressed directly to the jury.

After some further examination, the court directed the district attorney to propound his question so that he could hear formal objection thereto, and the question put was: "State, Captain Newton, what the request was which the defendant made." Objection was interposed and sustained (Rec., p. 52), and no testimony whatever as to any statement made by the accused was permitted to go to the jury.

It appears, therefore, that the only remark made in the presence of the jury purporting to state anything said by Holt was the witness' reply to Doctor Porter, "What good would it do my mother or sisters if I did state it," and this was drawn out by counsel for plaintiff in error, was immediately excluded, and the jury was given positive instructions that they should not consider it.

These facts fail to show any error upon the part of the court, for the following reasons:

First. *It was proper for the jury to remain during the preliminary examination of the witnesses.*

In fact, under the rule adopted by this court and by a number of state appellate courts, it appears that no other course could be pursued. In *Wilson* v. *United States* (162 U. S., 613, 624) the following rule is laid down as to the admissibility of confessions when the evidence as to whether a confession is or is not voluntary is in conflict:

> When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the

> direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant. (*Commonwealth* v. *Preece*, 140 Mass., 276; *People* v. *Howes*, 81 Mich., 396; *Thomas* v. *State*, 84 Ga., 613; *Hardy* v. *United States*, 3 D. C. App., 35.)

By the following authorities, in addition to those cited by the court in this quotation, it is held that where there is no conflict in the testimony as to whether a confession is voluntary, then it presents a question of law which is for the determination of the court, and it should be excluded or admitted in accordance with the facts shown; but where there is a conflict in the evidence with reference to whether the confession was procured by threats or by inducement the question should go to the jury together with the confession, and the jury should be instructed that if they find that the confession was not entirely voluntary they should wholly disregard it.

*Bailey* v. *State* (80 Ga., 359).
*State* v. *Storms* (113 Iowa, 385, 387, 390).
*Commonwealth* v. *Burrough* (162 Mass., 513).
*Roesel* v. *State* (62 N. J. Law, 216, 238).
*State* v. *Moore* (160 Mo., 443, 460).
*People* v. *Cassidy* (133 N. Y., 612).
*Burdge* v. *State* (53 Ohio St., 512, 517).
*Commonwealth* v. *Epps* (193 Pa. St., 512, 517).
*Raines* v. *State* (33 Tex. Crim. App., 294, 298).

Inasmuch, therefore, as the jury can be trusted with the entire testimony, and its exclusion be left to them

as a question of fact, they certainly can not be improperly influenced by a mere preliminary examination in which nothing appears except whether a statement made by the accused, the character of which is not disclosed, was voluntary or otherwise.

Furthermore, the court can not be required to exclude the jury for the mere purpose of ascertaining whether the admissibility of the testimony as to the alleged confession is a question of law or a question of fact for the jury.

In nearly all of the cases cited on page 45 of plaintiff in error's brief the question here presented was treated merely as an academic one, some of the cases being affirmed and others reversed on other grounds; and in but three jurisdictions, to wit, Mississippi, Georgia, and Texas, can it be said that to permit the preliminary examination to determine the competency of a confession to be conducted in the presence of the jury was held to be reversible error when the evidence was found to be incompetent; and in the later case of *Woodsfolk* v. *State* (81 Ga., 37), the contention that such an effect should be given to such action of the court was expressly repudiated.

Second. *If any prejudice might otherwise have arisen from the presence of the jury while the matters in question were considered, it was cured by the positive and repeated instruction given by the court to the jury that those were matters entirely for him, and were not for their consideration.*

In *Carroll* v. *United States* (154 Fed., 425, 429, 430) it appeared that during the progress of the trial

the district attorney stated to the court in the presence of the jury that he was informed that typewritten lists of the panel of the jury sitting in the case had been distributed in town, with the request that if any of the parties to whom such list might be handed had any friends on the jury, they intercede on behalf of the defendant; and a colloquy passed between the district attorney and the court with reference to such conduct being a matter of contempt. Thereupon vigorous objection was made by counsel for defendant, and at the close of a discussion of some length the court stated to the jury that he had not intended to keep them together, but in consequence of what had transpired he thought it was the proper thing to do, but further warned them that they should not allow what had taken place to influence their minds in the least, either one way or the other, because it was not a matter of evidence, and was not a matter that they should consider, and that they should lay the transaction entirely out of their minds.

The Circuit Court of Appeals, Ninth Circuit, held that they were not convinced that the transaction in question was prejudicial; and held that if it were, the evil effect was removed by the warning given by the court to the jury, saying:

> With some rare exceptions arising from extreme cases, it is generally held that prejudice created by unwarranted statements of counsel in the presence of the jury is sufficiently cured by an admonition of the court to the jury, such as was given in the present case,

citing in support of this proposition a large number of authorities.

In *Osborne* v. *Wilkes* (108 N. Car., 651, 665), when the plaintiff rested his case, the judge asked counsel in the presence of the jury, in effect, whether they did not think that the defendants might safely demur, and required both parties to give him the benefit of their views upon the question of law thus propounded. After hearing the argument the court requested defendants to proceed, and subsequently cautioned the jury that the court had no right to intimate, and had not in fact intimated, an opinion in favor of the defendants by requiring argument, or against them by requiring them subsequently to develop their defense. In passing on this question the Supreme Court said:

> Neither the letter nor the spirit of the law was violated. The jury were cautioned after the argument, and warned subsequently in the instructions given them, that they must draw no inference prejudicial to either of the parties from the request for an argument on the one hand, or the order made at its conclusion on the other. There was no good ground for complaint on the part of either.

Third. *The matters which transpired inthe presence of the jury were not sufficient to justify a reversal, even if the court had given no warning or instructions to the jury.*

In *Kansas City, etc., Railroad Co.* v. *McDonald* (51 Fed., 178, 181), which was an action brought against

the railroad company for damages received in a collision, while the case was on trial and in the presence of the jury the court received a verdict rendered in another case brought against the defendant company for injuries received in the same accident; and this was assigned as error. The Circuit Court of Appeals for the Eighth Circuit, composed of Mr. Justice Brewer and Judges Sanborn and Shiras, in overruling this assignment, said:

> It can not be assumed that the jury engaged in the trial of the case at bar would understand that the verdict read in their hearing formed any part of the evidence submitted to their consideration. As men of ordinary intelligence, they must have known that the reception and reading of the verdict rendered in the other case was not part of the trial in which they were sitting as jurors, but was a matter wholly aside therefrom. The fact that they obtained knowledge of the verdict in the *Stoner case* by hearing it read in open court can not be assumed to have affected their judgment in any degree other or different from what would have been the effect if they had obtained knowledge of it by reading the newspapers, or by hearing the record of the court proceedings read in the usual open and public manner; and certainly it would not be claimed that, because the jury learned in either of these ways of the rendition of the verdict in the *Stoner case*, they were disqualified from sitting as a jury in the case at bar.

This language is equally applicable to the present case. If the jurors had seen in a newspaper, or it had been made known to them from any source, that a statement had been made by the accused, the substance of the statement not having been detailed, and the same language had been repeated to them as was used by the witnesses and counsel in their presence, they would certainly not have been disqualified thereby. Furthermore, the bill of exceptions in this case does not purport to contain all the evidence; in fact, none is set out but that to which exceptions were taken and the part immediately connected therewith, and consequently the record fails to disclose how clearly the accused was proven guilty, and whether or not he could have been prejudiced by the remarks under consideration made by counsel and witnesses.

IV.

**The statements made by the United States attorney in the presence of the jury constitute no ground for reversal.** (Assignments of error 15–17 and 28 and 29.)

The statements of which complaint is made are as follows:

1. In opening the case, the United States attorney said that on the day when the body of the deceased was found, the defendant was held by the military officers of the fort, and while so held he (Holt) was taken to the hospital, his coat with soot marks on it was shown to him, and he voluntarily admitted that it was his coat; that his gunner's badge was shown

to him, the badge found upon the blue blouse all burned together in the furnace, and he admitted that it was his; but he denied at that time knowing anything about the crime; that this was Saturday afternoon; and that on Monday morning, while he was over in the hospital having his picture and finger prints taken, he said to Captain Newton:

"Captain, there is something I would like to say to you alone."

Counsel for defendant here interposed an objection to the introduction of any statements here as to what the defendant Holt had said after he was arrested, on the ground that while they can be explained, we should not be put to the trouble, time, and the burden of explaining them, or disproving them, as the case may be.

To which the district attorney responded:

> These are voluntary confessions. I am perfectly willing to omit them till the proper time comes, if counsel objects to them at this time. Therefore, gentlemen of the jury, I will not relate to you at this time anything that Holt said afterwards, voluntarily or otherwise. (R., p. 27.)

Counsel for accused excepted to the language of the prosecutor in stating that Holt made any confessions, and the court replied, "I didn't hear him say that he did;" and exception was reserved. (R., p. 27.)

The district attorney here detailed no part of any statement made by Holt, except that he said to

Captain Newton that there was something he would like to say to him alone.

Nor did counsel for plaintiff in error then insist that such statement as he had made to Captain Newton was incompetent. The intimation was that it was immaterial. The district attorney undoubtedly thought at that time that the conversation between Holt and Captain Newton was competent, and no just criticism can be made of his purpose to detail it, especially in view of the fact that he immediately desisted at the mere suggestion of opposing counsel.

It is assigned as error that the court did not instruct the jury to disregard this statement of the United States attorney. But no such request was made to the court. Moreover, this statement should be considered in connection with the subsequent action of the court in excluding all testimony with reference to a statement or confession by the accused, and giving specific instructions to the jury that they had nothing to do with such statements.

2. The statements made by the United States attorney in arguing the question of the inadmissibility of accused's confession have heretofore been given.

In this argument he made no remark which purported to contain any part of the statement made by accused. He, in fact, said nothing about the accused having made a confession. In referring to reported cases he mentioned under what circumstances confessions had been admitted, but with reference to the case at bar he never used the word

"confession," or referred to it in any other language than as a mere *statement*. If any prejudice could have been created by such mild remarks, it was removed by the direct instructions given the jury by the court.

When the earnestness with which plaintiff in error was defended by his attorneys is considered, it is submitted that the district attorney deserves the highest praise for his self-control and the fairness which characterized his conduct throughout the trial, and that the criticisms directed against him in counsel's brief are not justified by the record. He was to some extent persistent in endeavoring to show such a state of facts as rendered Holt's statement to Captain Newton competent, but certainly no more than it was his duty to be. The following authorities are cited to show to what extent prosecuting attorneys have gone in commenting upon a defendant's conduct or his failure to testify or present evidence, and yet it was not regarded as prejudicial against the accused. (*Frazier* v. *State*, 135 Ind., 38, 39; *State* v. *Preston*, 77 Mo., 294, 296; *Wooten* v. *State*, 50 Tex. Cr. R., 151, 154; *Walters* v. *State*, 94 S. W., 1038, 1039; *State* v. *Ruck*, 194 Mo., 416, 431; *Jones* v. *State*, 96 S. W., 930, 931; *Johnson* v. *Commonwealth*, 29 Ky. Law R., 675; *Parker* v. *State*, 39 Tex. Cr. R., 262, 264.)

V.

**There was no error in the admission of the several items of evidence which relate to the title of the United States in the Fort Worden Military Reservation, within which the offense was committed, and the exclusive jurisdiction of the United States thereover; and the evidence with reference thereto was sufficient to show that the United States did exercise exclusive jurisdiction over the same.** (Assignments of error 18–22 and 45.)

The bill of exceptions recites that it contains the entire evidence relating to the jurisdiction of the United States over the place where the crime is alleged to have been committed (Rec., p. 38), but, as will be hereinafter shown, a very material part of such evidence is not contained in the bill of exceptions. This evidence was given by M. C. Buckey, the district artillery engineer for the artillery district of Puget Sound, and the substance of such evidence and the various exceptions taken thereto are as follows:

Mr. Buckey was handed a blueprint of a map, which he identified as one prepared in his office from a tracing of the map of the Fort Worden Military Reservation. He then stated, in response to questions asked by counsel for the accused, that the map was found by him as one of the records of the office upon his arrival, and had been used for official purposes, but of his own knowledge he did not know that it was correct (Rec., p. 28). The map was offered and objected to, and the objection overruled, to which exception

was taken (Rec., p. 29). Witness was then shown a book entitled "United States Military Reservations, National Cemeteries, and National Parks. Title, Jurisdiction, etc. Prepared in the Office of the Judge-Advocate-General. Revised Edition by 1st Lieut. Charles E. Hay, jr., 24th U. S. Infantry. Washington, Government Printing Office, 1904;" and he testified that it was prepared in the War Department, and that "Fort Worden with its titles for the property" appears on page 389 of this book.

The United States attorney then introduced a number of deeds from various parties to the United States, and also a decree of condemnation of certain lands in case No. 1169, entitled *United States* v. *Chas. Isenbeis*, dated April 7, 1898, whereby the United States acquired title to the lands therein described, and remarked that "These, I understand, are all admitted" (Rec., pp. 30–32).

These title records were offered with the statement by the United States attorney, "I offer in evidence certified copies of the records of the auditor of Jefferson County, being the deeds and decrees in condemnation, referred to in that book." Counsel objected to that method of proving title, on the ground that the book itself is not evidence, and the question as to whether or not the Fort Worden Military Reservation is placed under the exclusive jurisdiction of the United States is a question for the jury alone. This objection was overruled and exception taken. (Rec., p. 30.)

After the introduction of the title papers, Mr. Buckey testified that he had no personal knowledge

as to whether or not the documents offered covered the land embraced in the Fort Worden Military Reservation, and counsel for defendant then asked that witness's testimony be stricken from the record, which was denied, the court stating that he was not at that time going to declare the effect of the evidence, whether it proved anything or not, but held that the records were competent and admissible. Exception to the court's ruling was taken. (Rec., p. 33.)

Witness then testified that he had been at Fort Worden slightly over two years; that to his personal knowledge it was a military reservation before 1901; that he was there then, but left; and further stated that he did not run the lines, and did not know that the boundaries of Fort Worden as contained in the map were identical with the outside boundaries on all the lines described in the exhibits. Motion was again made to strike the evidence out, which was overruled. (Rec., pp. 33–34.)

On reexamination by the United States attorney, Mr. Buckey testified that the band barracks were on that portion of the reservation which had been added, and that it had been under the control of the United States since about 1902. (The bill of exceptions recites that "all the evidence indicated that the crime charged in the indictment was committed in said band barracks.") (Rec., p. 38.) The court thereupon elicited from Mr. Buckey the following: That he knew the actual boundaries of the district over which the military authorities exercised jurisdiction; that he knew the boundaries of the Fort Worden district that was under actual military control; that

it was inclosed by a fence or inclosure, and that there were guards and sentries who excluded unauthorized persons from entering the grounds; that this was constant, day and night, and that the band barracks were within this inclosure. On further examination by counsel for accused, witness stated that he knew from his personal knowledge that the fence inclosing the reservation was practically coincident with the boundaries shown on the map, but he did not know from his own personal knowledge how it was with the boundaries shown in the deeds and decree of condemnation. (Rec., p. 35.)

Mr. Buckey was subsequently recalled and then testified that he had, since his previous testimony, made an examination of the original maps of the Fort Worden Military Reservation for the purpose of locating the band barracks; that the land now occupied by the barracks was described in condemnation proceedings No. 1169; and, on cross-examination, he stated that he had learned these facts from a consultation with the original maps of the reservation showing the different subdivisions on file in the engineer's office at Seattle; that he did not make those maps, but he made the computations from those maps and located the band barracks as the intersection of certain mentioned streets; and that he did not know that the maps were correct, but that they were official maps on file in the engineer's office, made under the authority of the War Department, and purporting on their face to be original maps from the original surveys made by

that office. Counsel for defendant then moved that the evidence be stricken out on the ground that the witness had no personal knowledge of the matter, and the maps introduced were not shown to be correct. The objection was overruled and exception taken. (Rec., pp. 35–37.)

*The title papers are not made a part of the bill of exceptions, and are not printed in the record; and there is no question but that the land described in these deeds and in the decree of condemnation was under the exclusive jurisdiction of the United States.*

To the several assignments based on the foregoing exceptions and facts, the following replies are submitted:

1. *It was not error for the witness Buckey to testify from the book.* (Eighteenth assignment.)

This book was compiled by the War Department, and if the court will take judicial notice thereof and of the contents so far as pertinent and admissible, there can be no error in any statement made therefrom by the witness. But, if the court will not take judicial notice of its contents, then the book is not before this court, because it is not made a part of the bill of exceptions, and the only evidence in the record with reference thereto, after it was described, is:

> Q. Turn to the part of that book relating to the Fort Worden Military Reservation.
>
> A. At page 389 of this book "Fort Worden with its titles for the property," appears. (Rec., p. 29.)

While it is recited that "Book marked 'Plaintiff's Exhibit B' received as evidence" (Rec., p. 30), yet it appears that this book was only treated as a memorandum, the witness calling therefrom the names of the parties to the deeds and records and the dates of same, *while the instruments themselves were introduced by the district attorney.*

2. *There was no error in admitting the title papers.* (Nineteenth assignment.)

Their introduction, in fact, was not objected to. Counsel merely stated that he objected to that method of proving Federal jurisdiction, referring to the method used by witness in refreshing his recollection by an examination of the book. (Rec., p. 32.) The court remarked that the papers were admissible, but he would not declare whether they proved anything or not; and counsel then asked that the evidence *identifying the lands described in the deeds* be stricken out. (Rec., p. 33.) Moreover, the title papers are not in the record, and their competency or incompetency can not be considered.

3. *The court properly refused to strike out Witness Buckey's evidence locating the reservation.* (Twenty-first assignment.)

The witness was familiar with the reservation, and testified from an official map; and before he was recalled he had made a careful examination of certain records which showed the location of certain streets; and he then testified positively that the band barracks were on the land acquired by condemnation proceedings No. 1169, the decree in which

was dated April 7, 1898. His evidence was certainly competent and whether it was sufficient or not to prove the facts contended for was a question for the jury.

4. *The evidence offered by the Government was amply sufficient to warrant a finding by the jury that the offense was committed within the jurisdiction of the United States courts.* (Forty-fifth assignment.)

Congress, in its appropriation acts, empowered the Secretary of War to purchase lands for fortification purposes. (See act of June 8, 1898, ch. 338, 29 Stat., 257; act of Mar. 3, 1897, ch. 384, 29 Stat., 641; act of May 7, 1898, ch. 248, 30 Stat., 400.)

The State of Washington, by act of its legislature, authorized the cession of lands purchased by the United States within its boundaries, and ceded to the United States full and complete jurisdiction over such lands. (Laws of 1890, p. 459, sec. 1; laws of 1891, p. 31, sec. 1; 2 Rem. & Ball. Codes and Statutes Washington, sec. 5863, p. 1248.)

The title papers described were executed and delivered to the Government. *These instruments are not made a part of the bill of exceptions, and inasmuch as the descriptions contained therein may have been so definite as to locate, without other testimony, the boundaries of the land conveyed, in their absence the court will presume that the boundaries of the reservation were sufficiently located.* But the witness Buckey, after examining certain public records and the reservation itself, positively testified that the band barracks were located on the lands described in a certain

document. Furthermore, he testified that he knew the boundaries of the Fort Worden district that was under actual military control; that it was inclosed by a fence; that there were guards and sentries both night and day who excluded unauthorized persons from entering those grounds, and that the band barracks where the crime was shown to have been committed are within that inclosure. (Rec., p. 35.) Whether Fort Worden was a military reservation within the exclusive jurisdiction of the United States and whether the offense was committed within this jurisdiction were submitted as questions of fact by the court to the jury, which found in favor of the Government; and as there was evidence tending to support this finding, it is conclusive upon this court. (*Burton* v. *United States*, 202, U. S., 344, 373.)

Moreover, the court will take judicial knowledge of the fact that Fort Worden was a military reservation, because the withdrawal of a portion of these lands from the public domain, which was done in 1866, and the purchase of the remainder and the assumption of jurisdiction thereover are matters of record in the War Department, and this court will take judicial notice thereof. (*Knight* v. *U. S. Land Association*, 142 U. S., 161, 169.)

In *United States* v. *Jackalow* (1 Black., 484, 487), it was held that the location of a boundary, when a material fact in the determination of the extent of the jurisdiction of a court, is a question of fact for the jury. But there is no dispute in this case as to the location of the boundaries of this military reserva-

tion, and the question of fact for the jury to determine was whether the murder occurred *within the reservation;* and *it is conceded that the offense was committed within the band barracks, which are a part thereof.* Therefore the only question upon this branch of the case was, whether Fort Worden was a military reservation within the exclusive jurisdiction of the United States; and this is the very thing the court will judicially know.

5. *In the thirty-ninth assignment it is assigned as error that the jury was allowed to take the above-mentioned book with them during their deliberations.*

While it does appear that this book was taken out by the jury, yet no objection was made thereto (R., p. 61); and clearly no injury to plaintiff in error could have resulted therefrom.

## VI.

**It was not error for the court to admit, over objection, the testimony which shows that the blouse introduced before the jury fit plaintiff in error.** (Assignments of error, 24–26.)

The evidence set out in the bill of exceptions with reference to this blouse is as follows:

Dr. E. H. Porter testified that he saw the blouse on Holt on Saturday afternoon, May 9, and when asked where, an objection was interposed on the ground that it was compelling the defendant to be a witness against himself. Then the following questions were put and answered:

> Q. *I will ask you whether Holt was compelled to put on that blouse?*
>
> A. *No.*

Q. *Did he put it on voluntarily?*

A. *Yes, sir.*

(Objection was here renewed and overruled.)

Q. Did you see the blouse on him that afternoon?

A. I did.

Q. Did, or did it not, fit him?

(Here witness was cross-examined by defendant's counsel.)

Q. Who told Holt to put on this blouse?

A. Captain Newton, I think.

Q. A superior officer?

A. Yes, sir.

(Objection was again interposed and overruled.)

Reexamination by the district attorney:

Q. What request was made to him to put it on?

A. He was asked to try it on.

Q. By whom?

A. I think Captain Newton.

Q. Did he try it on?

A. Yes; he did.

Q. Did it fit him?

(To which there was no response.)

(Rec., pp. 40–41.)

Witness R. P. Reeder stated that he saw Holt put on the blouse on the afternoon of his arrest, and that it fitted him. (Rec., p. 42.)

Witness H. W. Newton testified that after Holt's arrest he saw him with the blouse on, and that it fitted him about as well as those blouses fit any man; that they are usually a little loose. (Rec., pp. 54, 55.)

Neither Reeder nor Newton were asked how Holt happened to put the blouse on.

There is no evidence in the record of any duress exercised upon Holt, as a result of which he put on the blouse. The question asked Witness Porter by Holt's counsel was "Who *told* Holt to put on this blouse?" and the answer was "Captain Newton, I think;" but in response to the question by the district attorney, "What request was made to him to put it on?" the answer was "He was *asked* to try it on." Holt, therefore, acted in response to a mere request upon the part of Captain Newton.

It is submitted that no authority can be found which would exclude this testimony under these circumstances.

The principle decided in *Adams* v. *New York* (192 U. S., 585, 597) is applicable to these facts. In that case it was held that the fact that papers pertinent to an issue had been illegally taken from the possession of the party against whom they were offered was not a valid objection to their admissibility, and that by the introduction of such evidence the accused was not compelled to incriminate himself. Among other things, the court said:

> Nor do we think the accused was compelled to incriminate himself. He did not take the witness stand in his own behalf, as was his privilege under the laws of the State of New York. He was not compelled to testify concerning the papers or make any admission about them.

The following decisions of state courts also bear upon the question presented, some of them being directly in point:

In *Douglas's case* (20 W. Va., 770) it was held that the State could prove that the pistol with which the murder was committed was found in defendant's trunk, though found in consequence of information improperly extracted from the prisoner; and that the State could produce the pistol, although obtained by subterfuge from the prisoner's counsel.

In *Sprouse* v. *Commonwealth* (81 Virginia, 374, 378), the prisoner was charged with forging a check. After he was brought before the mayor, and before arrest, the mayor asked him to sign the name which he had forged, which, after some equivocation, he reluctantly did, and in doing so he spelled "Gibson" with a "p," as in the check. It was held that the evidence was admissible, and that—

> It can not be said that he was compelled to furnish evidence against himself, or that he made an undue confession; and there was no error in receiving the evidence on this subject.

In *O'Brien* v. *State* (125 Indiana, 38, 42) while the accused was in jail in another State some officers compelled him to remove his clothes so that they could examine scars on his body for identification. It was held that this evidence as to the scars was admissible on the trial, the ground apparently being the same as above expressed in *Adams* v. *New York*, that it was not the accused who was the witness before the jury, but the facts were detailed by other

parties, and the cases of *State* v. *Garrett* (71 N. Car., 85), and *Walker* v. *State* (7 Tex. Ct. App., 245), were cited as authorities in support of this position.

In *People* v. *Goldenson* (76 Cal., 347), it was held not to be error for the court to order the defendant to stand up during the trial that he might be identified by a witness.

In *People* v. *Gardner* (144 New York, 119, 129) it was stated by a witness that he could identify the defendant if he would stand up; and he was thereupon ordered by the court to stand up, which he did, and the action of the court was held not to be error.

In *State* v. *Jones* (153 Mo., 457, 460), after the prisoner was under arrest, the sheriff asked him to pull off his clothes so that he could examine him. The prisoner did so without hesitation; a doctor was then called in by the sheriff and examined his leg. It was held that the evidence of what was found on the examination was competent.

In *State* v. *Reasby* (100 Iowa, 231) it was held not error for the court to require a defendant accused of robbery to stand during the trial for identification by the party assaulted and robbed.

In *State* v. *Johnson* (67 N. Car., 55, 58) it was held not error to ask a woman, upon whom rape had been committed, to look around the court room and identify the party committing the rape, whereupon she looked at the defendant and said, "That is the black rascal."

In *State* v. *Garret* (71 N. Car., 85, 87) the accused claimed before the coroner's jury that the deceased

was burned to death, and that she had burnt her hands in trying to extinguish the flames, and she had her hand wrapped up. After the jury had found against her, and in their presence, the coroner ordered her to unwrap her hand, and it was found not to be burned. It was held that this evidence was admissible on the trial.

In *State* v. *Graham* (74 N. Car., 646) the officer had compelled the prisoner to put his foot in a track in a field, and it was held that the result of the comparison could be proved by the officer. The court said:

> It has been often held that if a person under duress confesses to having stolen goods and deposited them in a certain place, although his confession of the theft will be rejected, yet evidence that he stated where the goods were will be received, provided the goods were found at the place described.

From these authorities it is clear that no error was committed in admitting the testimony that the blouse in question fitted the plaintiff in error.

VII.

**The trial court committed no error in its instructions on the subject of presumption of innocence, or in refusing to instruct the proposition with reference thereto requested by plaintiff in error.** (Assignments of error 32 and 34.)

Upon the question of presumption of innocence the court's charge is as follows:

> The law presumes innocence in all criminal prosecutions. We begin with a legal presumption that the defendant, although accused, is

> an innocent man; not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted; that the evidence must overcome the legal presumption of innocence. And in order to overcome that legal presumption, as I have already stated, the evidence must be clear and convincing and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty. That is, there must be such positive and consistent testimony throughout to establish the fact that the defendant is guilty as charged as will leave the jury satisfied and convinced after they have given the testimony a candid consideration. It has to be more than a mere preponderance of the evidence. It has to be evidence that goes further than to establish the probability that the defendant is guilty. It has to prove positively that he is guilty. (Rec., p. 58–59.)

Exception was taken to the expression of the court—

> Not that we take that to be an absolute rule, but it is the principle upon which prosecutions must be conducted. (Rec., p. 60.)

This part of the charge constitutes the thirty-second assignment of error.

Plaintiff in error requested the court to submit to the jury upon this subject the following proposition:

> The prosecution must prove beyond a reasonable doubt every material allegation of the indictment as therein charged. Nothing is to be presumed or taken by implication

against the defendant. He is presumed to be innocent until his guilt is established beyond a reasonable doubt by competent and sufficient evidence. The presumption of innocence starts with the charge at the beginning of the trial, and goes with him until the determination of the case. This presumption of innocence is evidence in the defendant's favor, and should be so considered and weighed by you in determining the verdict you render in this case. To the presumption that the defendant is innocent you should add all the evidence in his favor and weigh this with the evidence against him, and then, unless you shall find the defendant guilty beyond all reasonable doubt, you will acquit him. (Rec., p. 60.)

Upon the court's refusal to charge the same is based the 34th assignment of error.

Neither of these assignments are well taken for the following reasons:

1. *The expression in the charge to which exception was taken is but an incidental remark of the court, appearing in a correct exposition of the law upon this subject, and is neither within itself an incorrect statement, nor could it in any event mislead the jury.*

While the court in this remark stated that the presumption of innocence was not, as a matter of fact, an absolute rule, yet he added that it was the principle upon which criminal cases are prosecuted, and he then proceeded to state what character and quantity of evidence were sufficient to comply with the rule.

2. *It was not error to refuse to submit the instruction requested, because:*

(*a*) *The court had already, in the charge, given a correct exposition of the law with reference to the presumption of innocence.*

In *Agnew* v. *United States* (165 U. S., 36, 51) this same question in principle was presented. The trial court had charged the jury that—

> The defendant is presumed to be innocent of all the charges against him until he is proven guilty by the evidence submitted to you. This presumption remains with the defendant until such time in the progress of the case that you are satisfied of the guilt beyond a reasonable doubt.

The defendant submitted to the court the proposition that—

> Every man is presumed to be innocent until he is proved guilty, and this legal presumption of innocence is to be regarded by the jury in this case as matter of evidence to the benefit of which the party is entitled. This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy.

The court's refusal to charge this proposition was assigned as error. In passing upon the question, this court said:

> The court is not bound to accept the language which counsel employ in framing instructions, nor is it bound to repeat instructions already given in different language. The instruction

> given was quite correct and substantially covered the instruction refused, and as to the latter the court might well have declined to give it on the ground of the tendency of its closing sentence to mislead.

It will be observed that there the difference between the principle as charged and the principle as requested was that in the charge the court failed to state to the jury that the presumption of innocence was to be regarded by the jury as evidence, while the request contained this principle. In the present case precisely the same difference exists.

(*b*) *The assertion in the request that*—

> The presumption of innocence starts with the charge at the beginning of the trial, and goes with him until the determination of the case,

*is not correct, and a part of the request being erroneous, the court can not be put in error for refusing to charge it as a whole.*

Under the decisions of this court it is not true that the presumption of innocence goes with the accused *until the determination of the case.*

In *Allen* v. *United States* (164 U. S., 492, 500) the trial court had charged the jury that they could not find the defendant guilty unless they were satisfied from the testimony that the crime was established beyond a reasonable doubt, and that this meant,

> first, that a party starts into a trial, though accused by the grand jury with the crime of murder, or any other crime, with the presumption of innocence in his favor. That stays

> with him *until it is driven out of the case by the testimony. It is driven out of the case when the evidence shows, beyond a reasonable doubt, that the crime as charged has been committed, or, that a crime has been committed. Whenever the proof shows beyond a reasonable doubt the existence of a crime, then the presumption of innocence disappears from the case. That exists up to the time that it is driven out in that way by proof to that extent.*

The only comment of this court thereon was that—

> The court having thus charged upon the subject of the presumption of innocence, could not be required to repeat the charge in a separate instruction at the request of the defendant.

In *Wilson* v. *United States* (162 U. S., 613, 619) this court said:

> Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence—

which principle is inconsistent with the idea that presumption of innocence remains with the accused until the case is determined.

(c) *The proposition that the presumption of innocence is evidence in the defendant's favor, and should be so considered and weighed, is not correct.*

In *Coffin* v. *United States* (156 U. S., 432, 452) the trial court, in its charge, had failed to mention to the jury the principle of presumption of innocence, and had been requested by the defendant to charge that—

> The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty. To the benefit of this presumption the defendants are all entitled, and this presumption stands as their sufficient protection unless it has been removed by evidence proving their guilt beyond a reasonable doubt.

This court held that because the general charge contained nothing upon this subject, the refusal of the court to charge the proposition was error, and in the discussion of the question it was said:

> Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

The court cited, in support of this declaration, the expression from 1 Greenleaf Ev., sec. 34, that—

> This legal presumption of innocence is to be regarded by the jury, in every case, *as matter of evidence to the benefit of which the party is entitled;*

and an article in the Criminal Law Magazine for January, 1889, in which it was said that—

> This presumption is in the nature of evidence in his favor (i. e., in favor of the accused) and a knowledge of it should be communicated to the jury.

It is respectfully submitted that this declaration of the court has been disregarded and in effect overruled in subsequent cases.

As above shown, in *Agnew* v. *United States* (*supra*) it was held not to be error for the court to refuse to charge such principle couched in the same language as the foregoing quotation when it had been omitted from the general charge; and in speaking of the sentence, "This presumption is to be treated by you as evidence giving rise to resulting proof to the full extent of its legal efficacy," this court said that the court might well have declined to give the proposition on the ground of the tendency of this sentence to mislead.

Likewise, in *Allen* v. *United States* (*supra*) a charge was recognized as correct which did not express the principle that presumption of innocence is evidence.

As further authority upon this question, in the sixteenth edition of Greenleaf on Evidence, which

was edited by Professor Wigmore, of the Northwestern University, in a lengthy note to the quotation used in the case of *Coffin* v. *United States*, it is said that the phrase that—

> This legal presumption of innocence is to be regarded by the jury in every case as matter of evidence to the benefit of which the party is entitled (for which no authority was cited)

is an unfortunate one and has served to create some misunderstanding and confusion.

The same position is taken by Professor Wigmore in his work on evidence, volume 4, section 2511, in which he says:

> Presumption of innocence is a term which has been the subject of two special fallacies, namely, (1) that it is a genuine addition to the number of presumptions, and (2) that it is *per se* evidence.

With reference to the second fallacy, the author says:

> As to the second fallacy, it seems to have been mainly propagated by the passage of Professor Greenleaf declaring that "this legal presumption of innocence is to be regarded by the jury in every case as *matter of evidence*, to the benefit of which the party is entitled." But it can not be regarded as "matter of evidence." No presumption can *be* evidence; it is a rule about the duty of producing evidence.

The question of presumption of innocence in criminal cases was most carefully and philosophically considered by Professor Thayer in a lecture before the

law school of Yale University, which appears as Appendix B to his treatise on Evidence at the Common Law, pages 551 et seq., and beginning with page 566, he carefully analyzes and criticises the decision of this court in the *Coffin* case. We respectfully insist that it is therein demonstrated, as clearly as a question can be demonstrated by human reasoning, that the presumption of innocence is not evidence, and can not be so considered by the jury.

Inasmuch, therefore, as the request was erroneous in part, the court properly refused to charge the same or any part thereof. (*Holmgren* v. *United States*, 217 U. S., 509.)

## VIII.

**No error was committed by the trial court in charging, or refusing to charge, requests on the question of reasonable doubt.** (Assignments of error 33 and 35–38.)

The court gave the following instruction upon this principle:

> Now, the term "reasonable doubt" is to be understood by the jury as being an actual substantial doubt left in your minds that you are conscious of after having given the testimony consideration, and such a doubt as a reasonable person might entertain, and such a doubt as a reasonable person, acting honestly and candidly, would be influenced by where he is acting in a matter of great importance in his personal affairs. Do not misunderstand the phrase "reasonable doubt" as being the same thing or synonymous with any kind of a doubt, or

that the phrase or the principle means that the Government is placed in the situation of having to do an impossible thing—of establishing the guilt of an accused person to an absolute moral certainty. As I have said, the term "reasonable doubt" is to be understood in the ordinary meaning and acceptation of these two words coupled together, qualifying each other.

If after giving this case a full and candid consideration you feel that you are fully convinced that the Government has made out its case and proved that the defendant is guilty, and when you have deliberated on it and feel that you have left no substantial doubt in your minds, or not such a doubt as would influence a reasonable person acting with honesty and with a firm purpose to do right, then your verdict should be that the defendant is guilty as charged in the indictment. But if, on the other hand, although the evidence preponderates against him and raises a probability that he is guilty, if you feel in your minds that you have a substantial reasonable doubt, it is your duty to give the defendant the benefit of that doubt and return here a verdict of not guilty. (R., p. 59.)

This portion of the court's charge is the basis of the thirty-sixth assignment of error, *although no exception was taken to any part thereof, except the expression "that the phrase or the principle means that the Government is placed in the situation of having to do an impossible thing, of establishing the guilt of an*

*accused person to an absolute moral certainty.*" (Rec., pp. 60–61.)

This clause, together with the preceding clause "Do not misunderstand the phrase 'reasonable doubt' as being the same thing or synonymous with any kind of a doubt," *to which no exception was taken,* are the basis of the thirty-third assignment of error. Plaintiff in error requested the court to charge the jury upon this subject as follows:

> A reasonable doubt, as the term is employed in the administration of criminal law, is an honest, substantial misgiving, generated by the evidence, or want of it. It is such a state of the evidence as fails to convince your judgment and conscience and satisfy your reason of the guilt of the accused. If the whole evidence, when carefully examined, weighed, compared, and considered, produces in your minds a settled conviction or belief of the defendant's guilt, such an abiding conviction as you would be willing to act upon in the most weighty and important affairs of your own life, you may be said to be free from any reasonable doubt, and should find a verdict in accordance with that conviction and belief. If there is any one single fact proved to the satisfaction of the jury by preponderance of the evidence which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant. (Rec., p. 60.)

The refusal of the court to so charge is assigned as error in the thirty-fifth assignment.

After the jury retired, they returned into court and inquired of the court what constituted a reasonable doubt, and in response thereto the court said:

> A reasonable doubt is an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit. In the explanation of the rule which I gave in the general instructions to this jury I endeavored to refute the theory which sometimes prevails with jurors in criminal cases that any mere possibility may constitute sufficient ground for a reasonable doubt upon which the decision of a case may be based. The law does not contemplate bare possibilities, but does regard actual things. Jurymen should not be controlled by any fantastic theory, but in the performance of jury service you should decide controversies as you would any important question in your own business affairs. (Rec., p. 61.)

To this instruction *as a whole* exception was taken, and it is assigned as error in the thirty-seventh assignment.

Notwithstanding the fact that the jury had asked for no additional instructions on the subject of cir-

cumstantial evidence, yet at the conclusion of this instruction counsel for plaintiff in error requested the court to add the following:

> Inasmuch as this is a case of circumstantial evidence, we ask your honor to instruct the jury at this time that if they shall find one fact established by a preponderance of the evidence which is inconsistent with the guilt of the defendant, that will be sufficient to raise a reasonable doubt and they should acquit him. (Rec., p. 62.)

The refusal of the court to add this request to his instruction is the basis of the thirty-eighth assignment of error.

As especially bearing upon this last proposition, the court in his general charge, in commenting upon circumstantial evidence and how it should be considered, and the weight to be given thereto by the jury, and the principle of reasonable doubt as applied thereto, had said:

> You are instructed further that circumstantial evidence is legal and competent in criminal cases, and if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is entitled to the same weight as direct testimony. You are instructed that what is meant by circumstantial evidence in criminal cases is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged; you are instructed as a matter of law that where a conviction for a criminal offense is sought upon

> circumstantial evidence alone, the Government must not only show beyond a reasonable doubt that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible with any reasonable hypothesis consistent with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused and that to authorize a conviction on circumstantial evidence the circumstances should not only be consistent with defendant's guilt, but they must be inconsistent with any other reasonable conclusion, and such as to leave no reasonable doubt in the minds of the jury of defendant's guilt. *If there is any one single fact proved to the satisfaction of the jury by preponderance of the evidence which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant.* (Rec., p. 58.)

Nothing in the action of the court in charging as above set forth, and refusing to charge the propositions submitted upon the question of reasonable doubt, justifies this court in reversing the case, because:

1. *It was not error for the court to state to the jury: "Do not misunderstand the phrase 'reasonable doubt' as being the same thing or synonymous with any kind of a doubt, or that the phrase or the principle means that the Government is placed in the situation of having to do an impossible thing, of establishing the guilt of an accused person to an absolute moral certainty."*

The criticism is directed against the closing expression (thirty-third assignment of error).

In 12 Cyc., 624, it is said:

> It is correct to charge the jury that they must be convinced to a moral certainty of defendant's guilt in connection with a charge that they must be convinced beyond all reasonable doubt, for these phrases are by some of the cases regarded as equivalent to each other.

In support of this statement cases from a number of States are cited, but none decided by this court. However, there is a material difference between the expression "to a moral certainty," which is here used, and the expression "*absolute* moral certainty," as used by the court. What the court intended to, and in effect did, state, and what the jury must have understood him to mean, was that it was not incumbent upon the United States to prove the guilt of the defendant to an absolute certainty. In the remainder of the charge upon this subject, in the midst of which this sentence appears, the court correctly and fully explains the meaning of a reasonable doubt, and this expression, as thus appearing, could not have to any extent misled the jury.

2. *It was not error for the court to refuse the instruction requested by plaintiff in error's counsel, and which is set forth in the thirty-fifth assignment.*

The court, in his general charge, stated precisely the same principles in language fully as clear and as favorable to the accused.

3. *This court can not reverse on the thirty-sixth assignment, in which the entire charge of the court on the question of reasonable doubt, except the part which deals also with circumstantial evidence, is set out, because:*

(*a*) *No error appears therein.*

In *Hopt* v. *Utah* (120 U. S., 430, 439) the following definition of reasonable doubt was held to contain no error:

> The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

With reference to the illustration that the jury would have no reasonable doubt if they had an abiding conviction such as they would be willing to act upon in the more weighty and important matters relating to their own affairs, which is similar to the remark of the court in the present case, the court said:

> But an illustration like the one given in this case, by reference to the conviction upon which the jurors would act in the weighty and impor-

> tant concerns of life, would be likely to aid them to a right conclusion, when an attempted definition might fail. If the evidence produced be of such a convincing character that they would unhesitatingly be governed by it in such weighty and important matters, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty that attends all human evidence. The instruction in the case before us is as just a guide to practical men as can well be given. (P. 441.)

The correctness of such instruction is recognized by counsel for the accused, because it was embraced in the request submitted by them.

In *Dunbar* v. *United States* (156 U. S., 185, 199) objection was raised to the use of the term "strong probabilities," which appeared in the charge as follows:

> I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt; that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as, not to exclude all doubt or possibility of error, but as to exclude reasonable doubt.

And the court held that the charge was correct.

(*b*) *This charge as a whole was not excepted to, and if it had been, there was certainly no error in some of the*

*propositions stated therein, and the court will not consider an erroneous proposition not specifically excepted to, which appears in connection with other propositions which are not erroneous, although an exception be taken to them all as a whole.*

4. *There was no error in the definition of reasonable doubt given at the instance of the jury, when it returned into court.* (Thirty-seventh assignment.)

This is but a restatement, in different language, of the previous charge of the court, and as above stated with reference to the thirty-sixth assignment, in any event, many of the propositions are correct, and the exception being to the whole the court will not consider such as may be incorrect. (*Mobile and Montgomery Ry. Co.* v. *Jurey*, 111 U. S., 584, 596.)

5. *It was not error for the court, at the close of the instructions given in response to the request of the jury, to refuse to charge plaintiff in error's request, that "If they shall find one fact established by a preponderance of the evidence which is inconsistent with the guilt of the defendant, that will be sufficient to raise a reasonable doubt and they should acquit him," because—*

(*a*) This request relates to circumstantial evidence, and the court had previously charged fully upon that subject, *and the jury made no request for a repetition of such charge, or for any instruction relating to that question.*

(*b*) The same principle, in almost the same language, had been given to the jury in the general charge. (Rec., p. 58.)

(c) The principle was in fact not the law, although, for the benefit of the accused, it had been previously charged by the court. The reasonable doubt must relate to the belief of guilt or innocence of the accused, arising from the *entire evidence, taken as a whole*, and not to any particular link or fact in the evidence.

In 12 Cyc., 627, it is said:

> While all the essential facts constituting a crime must be established beyond a reasonable doubt, it is not required that each link in the chain of circumstances relied upon to establish defendant's guilt should be so proved. It is sufficient if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt that defendant is guilty.

And, in the note thereto, it is said:

> As a general rule, therefore, a charge is sufficient if it applies the doctrine of reasonable doubt to the whole of the case. It is not necessary that it should be applied to each question in issue.

## IX.

**It was not error for the court to permit the jurors to separate.** (Assignment of error 43.)

During the progress of the trial no request was made of the court that the jury be kept together, and nothing whatever was said to the court with reference to the matter. It was first mentioned in an affidavit filed by counsel for plaintiff in error in support of his motion for a new trial, wherein he says that "from the time said jury was sworn to try

said case until they retired to consider their verdict, each and every one of the members of said jury was permitted to separate from the other members thereof." (Rec., p. 66.)

In regard to what occurred in consequence of their separation, the affiant stated that he was informed by George Doran, one of the jurors, that he, Doran, during the trial "engaged in conversation with one of his hired men on his, the said Doran's farm, and that during said conversation the trial of this case was referred to and discussed to some extent by the said hired man and the said juror, Doran." (R., p. 66.) What was said in this conversation does not appear, and certainly there is nothing in the record to indicate that Doran was in the least unfavorably influenced thereby against plaintiff in error. It does appear, however, that Doran filed a counter affidavit in which he swore that he had not during any part of the trial of said case conversed with any one about said case, or about the issues involved therein. (R., p. 72.)

With the record in this condition the fact that the jurors were not kept together affords no ground for reversal. The many authorities cited by counsel on pages 102 and 103 of their brief, have little or no bearing upon this question. As is well known, in many of the States there are statutes prohibiting the separation of jurors while trying felony cases. And in those jurisdictions there is conflict of authority as to upon whom the burden rests to show whether or not the accused is prejudiced in consequence of the separa-

tion. But in United States courts the universal practice is that jurors be permitted, while not actually engaged in trial, to separate and engage in the ordinary vocations of life, unless there be special reasons called to the court's attention which show that to permit such separation would probably prevent a fair and impartial trial; and the jury will be kept together when such fact is made to appear either by the Government or by the accused. There is nothing whatever in this record to indicate that if a request to keep the jury together had been made by the accused, and had been refused, the court would have been in error, as there is nothing tending to show that there was any undue prejudice against the accused among those with whom the jurymen would likely come in contact.

X.

**The case should not be reversed in consequence of the publication of the newspaper articles set out in the record.** (R., pp. 66, 72.)

It sufficiently appears from the affidavit of counsel for the accused that the articles mentioned were published, but as to whether or not the jurors or either of them read these particular publications the record is silent. It is stated in the affidavit that no restraint was placed upon any of the jurors as to whether or not they should or should not read the newspaper accounts of the trial while it was pending and before a verdict was rendered. (R., p. 66.)

The affiant further stated that the various members of the jury who tried the case read the daily

newspapers during the progress of the trial; that jurors Douglas and Pumphrey stated to the affiant after the verdict was rendered that they read the Seattle daily papers during the progress of the trial, including articles concerning and commenting on the case; but the affiant was unable to learn from these jurors which articles relating to the trial they had read, or whether they had read all of them. (R., p. 72.)

The court treated this affidavit as stating the truth and refused to permit counter affidavits to be filed. It therefore was not made to appear that a single one of the articles of which complaint is made was ever seen by either of the jurors during the progress of the trial. Consequently, plaintiff in error is in no attitude to raise the question whether or not a reading of such articles by a juror would constitute a reversible error; and the authorities cited in his brief have no application to the case.

In *Mattox* v. *United States* (146 U. S., 140–149) it was shown that the bailiff, who had the jury in charge, had made to them very damaging statements, and it was also shown that the newspaper article complained of was read in the presence and hearing of the jury.

There is a conclusive reason however why the case can not be reversed on this ground, or because the jury were permitted to separate. It was within the sound discretion of the court below from the facts presented to determine whether the accused had been prejudiced by the matters shown and whether he was entitled to a new trial, and the determination of that

question by that court is conclusive upon this court. In *Maddox* v. *United States, supra* (p. 147), it was said that "the allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result can not be made the subject of review by writ of error." (Citing *Henderson* v. *Moore,* 5 Cranch, 11, and *Newcomb* v. *Wood,* 97 U. S., 581.)

This rule has been universally followed by the United States appellate courts.

The affidavits were considered by this court in the *Mattox* case and a new trial allowed solely on the ground that the court below had refused to accept the affidavits, and this court did what ought to have been done by the court below. But in the present case the court did receive and consider the affidavits presented by counsel for plaintiff in error, and treated the statements therein made as true; and from what was therein stated, and what had been observed by the court during the progress of the trial, he found as a fact that the accused had not been prejudiced either by the separation of the jurors or by the alleged reading of the newspapers.

The judgment of the court below should therefore be affirmed.

J. A. FOWLER,
*Assistant Attorney-General.*

OCTOBER, 1910.

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